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## Relief from Default Judgments Under Rule 60(b)—A Study of Federal Case Law

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# PROJECT

## RELIEF FROM DEFAULT JUDGMENTS UNDER RULE 60(b)— A STUDY OF FEDERAL CASE LAW

### INTRODUCTION

The entry of a default judgment is one of the most severe sanctions that a federal court can impose upon a party for failure to comply with the Federal Rules of Civil Procedure.<sup>1</sup> Due to a party's failure to "plead or otherwise defend," the entry of a judgment under rule 55<sup>2</sup> is based solely on the assumption that the facts asserted in the

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1. *E.g.*, *Charlton L. Davis & Co. v. Fedder Data Center, Inc.*, 556 F.2d 308, 309 (5th Cir. 1977); *Trans World Airlines, Inc. v. Hughes*, 332 F.2d 602, 614 (2d Cir. 1964); *Beacon Gasoline Co. v. Sun Oil Co.*, 73 F.R.D. 505, 506 (W.D. La. 1977); *Kozlowski v. Sears, Roebuck and Co.*, 71 F.R.D. 594, 597 (D. Mass. 1976); *Owens-Illinois, Inc. v. Garrett*, 3 Bankr. Rep. (West) 557, 558 (Bankr. N.D. Ga. 1980).

2. Fed. R. Civ. P. 55 provides: "(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default. (b) Judgment. Judgment by default may be entered as follows: (1) *By the Clerk*. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person. (2) *By the Court*. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States. (c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b). (d) Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c). (e) Judgment Against the United States. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court."

opposing party's well-pleaded complaint are true.<sup>3</sup> Rule 60(b),<sup>4</sup> however, provides the means by which a defaulting party can move to set aside a default judgment.

Consideration of a rule 60(b) motion involves a balancing of two competing and often conflicting goals of the Federal Rules of Civil Procedure: the concern for judicial economy and orderly court proceedings and the concern for achieving justice through a trial on the merits.<sup>5</sup> The strong judicial preference for deciding cases on their merits rather than on procedural grounds militates in favor of setting aside default judgments and encourages liberal construction of the requirements for granting the motion.<sup>6</sup> This is counterbalanced, however, by the judiciary's need to promote the prompt and efficient handling of litigation and to preserve the finality of judgments.<sup>7</sup>

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3. See *Thomson v. Wooster*, 114 U.S. 104, 113 (1885); *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975); *Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 63-64, 69-70 (2d Cir. 1971), *rev'd on other grounds sub nom. Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973); *Clifton v. Tomb*, 21 F.2d 893, 897 (4th Cir. 1927).

4. Fed. R. Civ. P. 60(b) provides that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court." The main focus of this Project is on the treatment of motions to set aside default judgments. Our survey, however, also included an analysis of cases involving motions to set aside defaults under rule 55(c) and motions for entry of default judgments under rule 55(b). See note 2 *supra*. Courts address the same considerations in dealing with these motions. *E.g.*, *Spica v. Garczynski*, 78 F.R.D. 134, 135 (E.D. Pa. 1978); *United States v. Topeka Livestock Auction, Inc.*, 392 F. Supp. 944, 950 (N.D. Ind. 1975); *Chapman v. Henry A. Dreer, Inc.*, 14 F.R.D. 218, 219 (E.D. Pa. 1953). See note 21 *infra*. Because courts treat these motions similarly, references to set aside motions or to motions to set aside default judgments encompass both rule 55(c) and rule 60(b) motions. When it is necessary to distinguish those cases that involve the setting aside of a default or the entry of a default judgment from cases that involve the setting aside of a default judgment, the parenthetical "(default)" is used.

5. See notes 40-44 *infra* and accompanying text.

6. See note 42 *infra* and accompanying text.

7. See note 41 *infra* and accompanying text.

This Project will analyze how federal trial court judges have responded to and resolved the tension in the Federal Rules. By reviewing reported federal court decisions involving the setting aside of default judgments,<sup>8</sup> it will illustrate the conflicting treatment of issues arising in this area. An attempt will be made to provide the practitioner with a framework for operating within the rules governing the setting aside of default judgments. Part I will detail the mechanics of the relevant rules and the discretion that these rules grant to trial courts. Part II will analyze the relevant case law to determine how courts have interpreted the grounds for relief from default judgments provided in the rules. Part III will discuss how the courts have utilized judicially established requirements that a movant present a meritorious defense to the action and show lack of substantial prejudice to the non-defaulting party. Finally, to provide for a more equitable resolution of the tension in the rules, guidelines for deciding motions to set aside default judgments are proposed.

## I. AN OVERVIEW OF RULES 55 AND 60

### A. *The Mechanics of Rules 55 and 60*

Rules 55 and 60 provide the procedures for entering and setting aside defaults and default judgments.<sup>9</sup> The entry of a default judgment must be preceded by the entry of a default.<sup>10</sup> Rule 55(a) provides that the clerk shall enter the default of any "party against whom . . . affirmative relief is sought [and who] has failed to plead or otherwise defend as provided by these rules."<sup>11</sup> Typically, the failure

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8. This survey of federal case law uncovered approximately 250 decisions involving the setting aside of defaults and default judgments. These cases were categorized in an attempt to detail splits of opinion on certain issues and to establish trends revealing how these issues are being resolved. To supplement case law analysis, questionnaires were sent to approximately 400 district court judges. The questions were intended to elicit the judges' opinions concerning certain issues involved in considering motions to set aside defaults and default judgments. Statistical analysis of the results was not viable because only 10% of the judges responded. Nevertheless, when appropriate, those responses have been incorporated into the Project. See notes 21, 100, 171, 192, 231, 250, 283 *infra*. Copies of these responses are on file with the *Fordham Law Review*.

9. Fed. R. Civ. P. 55, 60.

10. Fed. R. Civ. P. 55; 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2682, at 251 (1973).

11. Fed. R. Civ. P. 55(a). Although this procedure will normally be handled by the clerk, rule 55(a) does not limit the court's power to enter a party's default. *Fisher v. Taylor*, 1 F.R.D. 448, 448 (E.D. Tenn. 1940); *United States v. Jackson*, 25 F. Supp. 79, 79-80 (D. Or. 1938); see 6 J. Moore, *Federal Practice* ¶ 55.03[1] (2d ed. 1976); 10 C. Wright & A. Miller, *supra* note 10, § 2682. Although the court may enter a party's default, application to the court instead of the clerk is not advisable. In both *Fisher* and *Jackson*, the courts stated that the procedure should be handled by the clerk. 1 F.R.D. at 448; 25 F. Supp. at 79. Moreover, the *Jackson* court warned that it would not entertain such applications in the future. 25 F. Supp. at 80.

"to plead or otherwise defend" results from a defendant's failure to answer the plaintiff's complaint within twenty days as mandated by rule 12(a).<sup>12</sup> A party may also fail to plead or otherwise defend by failing to respond to counterclaims,<sup>13</sup> cross-claims,<sup>14</sup> third-party claims,<sup>15</sup> or summary judgment motions,<sup>16</sup> failing to attend pretrial conferences<sup>17</sup> and other hearings,<sup>18</sup> failing to obey various court orders,<sup>19</sup> and failing to respond to certain discovery requests under rule 37.<sup>20</sup> The effect of an entry of default is that the defaulting party

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12. *E.g.*, *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 130 F.2d 185, 187 (3d Cir. 1942); *Boyer v. Wisconsin*, 55 F.R.D. 90, 91 (E.D. Wis. 1972); *SEC v. Vogel*, 49 F.R.D. 297, 298 (S.D.N.Y. 1969); *Canup v. Mississippi Valley Barge Line Co.*, 31 F.R.D. 282, 282 (W.D. Pa. 1962). Rule 12(a) provides in part that "[a] defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state." Fed. R. Civ. P. 12(a).

13. *E.g.*, *Tolson v. Hodge*, 411 F.2d 123, 125 (4th Cir. 1969); *Larson v. General Motors Corp.*, 134 F.2d 450, 452 (2d Cir.), *cert. denied*, 319 U.S. 762 (1943); *Commercial Cas. Ins. Co. v. White Line Transfer & Storage Co.*, 114 F.2d 946, 947 (8th Cir. 1940). "The provisions of [rule 55] apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim." Fed. R. Civ. P. 55(d). Rule 12(a) provides that a party must respond to these pleadings within 20 days. Fed. R. Civ. P. 12(a).

14. *E.g.*, *Commercial Cas. Ins. Co. v. White Line Transfer & Storage Co.*, 114 F.2d 946, 947 (8th Cir. 1940); *Maryland Nat'l Bank v. United States*, 227 F. Supp. 504, 510 (D. Md. 1964); *United States v. Foust Distilling Co.*, 36 F.R.D. 92, 93 (M.D. Pa. 1960).

15. *E.g.*, *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1203-04 (5th Cir. 1975); *Fehlhaber v. Indian Trails, Inc.*, 425 F.2d 715, 716 (3d Cir. 1970).

16. *E.g.*, *United States v. Cirami*, 563 F.2d 26, 29 (2d Cir. 1977); *cf.* *Kostenbauder v. Secretary, HEW*, 71 F.R.D. 449, 450 (M.D. Pa. 1976) (entry made under Local District Court rule 301.01(e)), *aff'd mem. sub nom.* *Kostenbauder v. Weinberger*, 556 F.2d 567 (3d Cir. 1977).

17. *E.g.*, *McGrady v. D'Andrea Elec., Inc.*, 434 F.2d 1000, 1001 (5th Cir. 1970); *Meeker v. Rizley*, 324 F.2d 269, 270 (10th Cir. 1963).

18. *E.g.*, *Bridoux v. Eastern Air Lines, Inc.*, 214 F.2d 207, 209 (D.C. Cir.) (failure to appear at pre-trial hearing), *cert. denied*, 348 U.S. 821 (1954); *Greene v. Pyatt*, 78 F.R.D. 362, 362-63 (E.D.N.Y. 1978) (failure to appear at pre-trial hearing on opposing party's motion to dismiss).

19. *E.g.*, *FTC v. Packers Brand Meats, Inc.*, 562 F.2d 9, 10 (8th Cir. 1977) (*per curiam*) (repeated failure to obey court order to show cause why plaintiff's petition to enforce a subpoena should not be granted); *Dolphin Plumbing Co. v. Financial Corp. of N. Am.*, 508 F.2d 1326, 1326-27 (5th Cir. 1975) (*per curiam*) (failure to obey court order to hire new attorney and have him appear in 14 days), *United States v. One (1) 1950 Burger Yacht, Fla. Registration #FL5163BE*, 395 F. Supp. 802, 802 (S.D. Fla. 1975) (failure to obey court order requiring the filing of a statement of all defenses in forfeiture proceeding); *Necchi Sewing Mach. Sales Corp. v. Sewline Co.*, 194 F. Supp. 602, 603-04 (S.D.N.Y. 1960) (failure to comply with court order to show cause why opposing party's petition to compel arbitration should not be granted).

20. *E.g.*, *Wilver v. Fisher*, 387 F.2d 66, 67-68 (10th Cir. 1967) (failure to answer interrogatories under rule 37(d)); *Pioche Mines Consol., Inc. v. Dolman*, 333 F.2d

loses his standing to contest the truth of all facts that are "well-pleaded" in the non-defaulting party's complaint.<sup>21</sup> Despite his de-

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257, 266 (9th Cir. 1964) (failure to appear at deposition under rule 37(d)), *cert. denied*, 380 U.S. 956 (1965); *Kozlowski v. Sears, Roebuck and Co.*, 71 F.R.D. 594, 596-97 (D. Mass. 1976) (failure to comply with rule 37(b) court order to produce documents); *Aberson v. Glassman*, 70 F.R.D. 683, 683-84 (S.D.N.Y. 1976) (failure to obey rule 37(b) court order to appear at deposition coupled with failure to appear at pre-trial conference); *Sonus Corp. v. Matsushita Elec. Indus. Co.*, 61 F.R.D. 644, 646 (D. Mass. 1974) (failure to comply with rule 37(b) court order to answer interrogatories). Rule 37(b) empowers a court to enter a default judgment when a party has refused to comply with certain court-ordered discovery requests; the rule also details which discovery requests can be the basis of a default judgment absent a court order. Fed. R. Civ. P. 37(b), (d).

21. See *Thomson v. Wooster*, 114 U.S. 104, 112-14 (1885); *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975); *Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 63-64, 69-70 (2d Cir. 1971), *rev'd on other grounds sub nom. Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973); *Clifton v. Tomb*, 21 F.2d 893, 897 (4th Cir. 1927); 6 J. Moore, *Federal Practice* ¶ 55.03[2], at 55-32 (2d ed. 1976); 10 C. Wright & A. Miller, *supra* note 10, § 2688, at 280. A default is not an absolute confession of liability. A defaulting party does not admit to facts that are not well-pleaded or to conclusions of law. *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975) (defaulting party successfully challenged the legal sufficiency of plaintiff's complaint that showed on its face that defaulting party had signed the contract at issue as agent for a disclosed principal and was, therefore, not a party to the contract). An entry of default is also not a final judgment. 6 J. Moore, *Federal Practice* ¶ 55.03[2], at 55-32, ¶ 55.09, at 55-201 (2d ed. 1976); e.g., *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 130 F.2d 185, 187 (3d Cir. 1942) (entry of default is a purely formal matter); *Titus v. Smith*, 51 F.R.D. 224, 226 (E.D. Pa. 1970) (entry of default is interlocutory); *I.T.S. Rubber Co. v. Essex Rubber Co.*, 25 F.2d 180, 183 (D. Mass. 1922) (same). The distinction between the interlocutory act of entry of default and a default judgment, which represents final judicial action, is implicit in the separate treatment given the entry and the setting aside of defaults and default judgments in rules 55 and 60(b). Although the task of entering a default judgment is normally left to the court, the entry of default is usually done by the clerk. Fed. R. Civ. P. 55; see note 11 *supra* and accompanying text; notes 23-27 *infra* and accompanying text. Similarly, separate standards of review for the setting aside of defaults and default judgments are set forth in rules 55(c) and 60(b). To set aside an entry of default, a movant need not meet rule 60(b) criteria, but need only establish "good cause." Fed. R. Civ. P. 55(c). Occasionally, courts are more lenient in treating rule 55(c) motions to set aside defaults than they are in treating rule 60(b) motions to set aside default judgments. E.g., *United States v. Topeka Livestock Auction, Inc.*, 392 F. Supp. 944, 950 (N.D. Ind. 1975); *Schartner v. Copeland*, 59 F.R.D. 653, 656 (M.D. Pa.), *aff'd mem.*, 487 F.2d 1395 (3d Cir. 1973); *Broder v. Charles Pfizer & Co.*, 54 F.R.D. 583, 583 (S.D.N.Y. 1971); *SEC v. Vogel*, 49 F.R.D. 297, 299 n.2 (S.D.N.Y. 1969); *Eisler v. Stritzler*, 45 F.R.D. 27, 27-28 (D.P.R. 1968); *Trueblood v. Grayson Shops, Inc.*, 32 F.R.D. 190, 195 (E.D. Va. 1963); see 6 J. Moore, *Federal Practice* ¶ 55.10[2], at 55-240 (2d ed. 1976); 10 C. Wright & A. Miller, *supra* note 10, § 2694, at 319. In determining whether "good cause" exists, courts consider the sufficiency of the excuse for the delay in failing to plead or otherwise defend, the promptness in filing the motion to set aside the default, and the presence of a meritorious defense, exactly the same factors relevant to determining whether a default judgment should be set aside. E.g., *Spica v. Garczynski*, 78 F.R.D. 134, 135 (E.D. Pa. 1978); *United*

fault, however, a defaulting party is entitled to a hearing on the issue of unliquidated damages.<sup>22</sup>

Under rule 55(b), a default can be reduced to judgment by two methods.<sup>23</sup> Rule 55(b)(1) mandates that the clerk enter a judgment by default "upon request of the plaintiff and upon affidavit of the amount due" if the defendant has failed to appear<sup>24</sup> and plaintiff's claim is for a sum certain.<sup>25</sup> If either of these two requirements is

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*States v. Topeka Livestock Auction, Inc.*, 392 F. Supp. 944, 950 (N.D. Ind. 1975); *Chapman v. Henry A. Dreer, Inc.*, 14 F.R.D. 218, 219 (E.D. Pa. 1953). Although the courts address the same considerations in dealing with the two types of motions, they do not always require that all the conditions necessary to set aside a default judgment be met to set aside an entry of default. For example, the court in *SEC v. Vogel*, 49 F.R.D. 297 (S.D.N.Y. 1969), noted that "'a court might feel justified in setting aside a default on a showing that would not move it to set aside a default judgment.'" *Id.* at 299 n.2 (quoting 6 J. Moore, *Federal Practice* ¶ 55.10[2], at 55-240 (2d ed. 1976) (footnote omitted)). In *Kulakowich v. A/S Borgestad*, 36 F.R.D. 185 (E.D. Pa. 1964), the court only required that the movant not be guilty of gross neglect. *Id.* at 186. Some courts have found that a movant's excuse for his delay need not be excusable according to rule 60(b) standards for the court to find "good cause" for granting the motion. *E.g.*, *Mitchell v. Eaves*, 24 F.R.D. 434 (E.D. Tenn. 1959) (granting movant's motion although movant's failure to obtain an extension of time in which to answer was considered inexcusable); *Teal v. King Farms Co.*, 18 F.R.D. 447, 447-48 (E.D. Pa. 1955) ("inadvertence, even if not strictly 'excusable,' may constitute good cause"). A rule 55(c) motion to set aside a default need not be made within any specific time period. *Elias v. Pitucci*, 13 F.R.D. 13 (E.D. Pa. 1952). The *Elias* court, in granting relief from a default on the basis of mistake when the movant delayed more than one year in filing his motion, noted that "[r]ule 55(c), under which the instant motion was filed, treats a default and a judgment as two separate and distinct items and in discussing the setting aside of defaults places no time limitation on the filing of same as does Rule 60(b) in discussing the setting aside of judgments." *Id.* at 15; *accord*, *Titus v. Smith*, 51 F.R.D. 224, 226 (E.D. Pa. 1970) (no fixed time limitation); *Stuski v. United States Lines*, 31 F.R.D. 188, 191 (E.D. Pa. 1962) (limited only by a reasonable time). Most rule 60(b) motions to set aside default judgments, however, must be brought within one year. Fed. R. Civ. P. 60(b); see note 64 *infra* and accompanying text. Of the 22 judges who responded to the question, "[h]ow do you differentiate the 'good cause' standard of Rule 55(c) for setting aside entry of default from the Rule 60(b) standards for setting aside a default judgment?," 13 indicated that they would not differentiate between the standards under the two rules. Two judges indicated that there is very little difference between the two rules. One judge cited timing as the only difference. Six judges, however, did recognize that the rule 55(c) standard of "good cause" should be applied less strictly than the rule 60(b) standards. See note 8 *supra*.

22. See *Jackson v. Beech*, 636 F.2d 831, 835 (D.C. Cir. 1980); *Hutton v. Fisher*, 359 F.2d 913, 916-17 (3d Cir. 1966); *Peitzman v. City of Illmo*, 141 F.2d 956, 962 (8th Cir.), *cert. denied*, 323 U.S. 718 (1944); *Gill v. Stalow*, 18 F.R.D. 508, 509-10 (S.D.N.Y. 1955), *rev'd on other grounds*, 240 F.2d 669 (2d Cir. 1957); 6 J. Moore, *Federal Practice* ¶ 55.03[2], at 55-32 (2d ed. 1976); 10 C. Wright & A. Miller, *supra* note 10, § 2688, at 284.

23. Fed. R. Civ. P. 55(b).

24. Fed. R. Civ. P. 55(b)(1). For a discussion of what is sufficient to constitute an appearance for rule 55(b) purposes, see pt. II(C) *infra*.

25. Fed. R. Civ. P. 55(b)(1). The rule 55(b)(1) requirement that the plaintiff's claim be "for a sum certain or for a sum which can by computation be made certain"

not met, the plaintiff may apply to the court for a default judgment under rule 55(b)(2).<sup>26</sup> This second method of reducing a default to judgment is to be employed in all cases not covered by rule 55(b)(1).<sup>27</sup> When a "party against whom judgment by default is sought has appeared in the action," rule 55(b)(2) requires that he "be served with written notice of the application for judgment at least 3 days prior to the hearing on such application."<sup>28</sup> Rule 55(b)(2) also grants courts broad discretionary power to hold hearings on damages, take testimony, conduct investigations, and accord the parties a trial by jury.<sup>29</sup>

The validity of a default judgment is determined under principles applicable to all final judgments.<sup>30</sup> It is subject to attack at any time

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merely directs that plaintiff's claim be for liquidated damages only. See 6 J. Moore, Federal Practice ¶ 55.04, at 55-41 to 55-425 (2d ed. 1976); 10 C. Wright & A. Miller, *supra* note 10, § 2683, at 25. A defaulting party is entitled to a hearing on unliquidated damages, thus barring the clerk from reducing these damages to judgment. See note 22 *supra* and accompanying text. Rule 55(b)(1) also bars the clerk from entering judgment against an infant or incompetent person. Fed. R. Civ. P. 55(b)(1); e.g., *Hutton v. Fisher*, 359 F.2d 913, 915 (3d Cir. 1966) (infant); *Zaro v. Strauss*, 167 F.2d 218, 220-21 (5th Cir. 1948) (incompetent). Although not set out in rule 55(b)(1), there are two other limitations on the clerk's power to enter a default judgment. The clerk is barred from entering a default judgment against "the United States or an officer or agency thereof." Fed. R. Civ. P. 55(e); see 6 J. Moore, Federal Practice ¶ 55.04, at 55-43, ¶ 55.12, at 55-321 (2d ed. 1976); 10 C. Wright & A. Miller, *supra* note 10, § 2683, at 260, § 2702, at 358. The clerk is also barred from entering the default of a party in the military service. Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. App. § 520 (West 1981); see 6 J. Moore, Federal Practice ¶ 55.04, at 55-43, ¶ 55.13, at 55-356 & n.19 (2d ed. 1976); 10 C. Wright & A. Miller, *supra* note 10, § 2683, at 260, § 2691, at 292.

26. Fed. R. Civ. P. 55(b)(2).

27. *Id.*

28. *Id.* For discussion of when a party has appeared for purposes of rule 55 and the effect of failure to notify an appearing party, see pt. II(C) *infra*.

29. Fed. R. Civ. P. 55(b); e.g., *Barber v. Turberville*, 218 F.2d 34, 37 (D.C. Cir. 1954) (jury trial granted when plaintiff endorsed a demand for jury trial on complaint); *Ferraro v. Arthur M. Rosenberg Co.*, 156 F.2d 212, 214 (2d Cir. 1946) (hearing needed to determine attorney's fees but not damages); *Peitzman v. City of Illmo*, 141 F.2d 956, 962-63 (8th Cir.) (jury trial granted when defendant had defaulted under rule 37), *cert. denied*, 323 U.S. 718 (1944); *Gill v. Stelow*, 18 F.R.D. 508, 510 (S.D.N.Y. 1955) (hearing on damages deemed necessary but defendant's request for jury trial denied because of dilatory tactics), *rev'd on other grounds*, 240 F.2d 669 (2d Cir. 1957); see 6 J. Moore, Federal Practice ¶ 55.07, at 55-95 (2d ed. 1976); 10 C. Wright & A. Miller, *supra* note 10, § 2688, at 279-80. A defaulting party has a right to a jury trial only "when and as required by any statute of the United States." Fed. R. Civ. P. 55(b)(2). Professors Wright and Miller note that § 1874 of title 28 is the only relevant statute. 10 C. Wright & A. Miller, *supra* note 10, § 2688, at 285.

30. 6 J. Moore, Federal Practice ¶ 55.09, at 55-201 (2d ed. 1976); 7 J. Moore, Federal Practice ¶ 60.25[2], at 297 (2d ed. 1979). A challenge to any judgment, including one occasioned by default, must be made pursuant to rule 60(b). Fed. R. Civ. P. 60(b). Professor Moore writes that "rule 60(b) applies, without any exceptions, to all final judgments entered under the Rules, and there is no sound reason



if the court is found to have lacked jurisdiction over the parties or the subject matter.<sup>31</sup> The effect of a default judgment, however, varies slightly from that of a final judgment rendered after a fully litigated trial on the merits. While the doctrine of *res judicata* applies to default judgments,<sup>32</sup> the majority of courts agree that collateral estoppel is inapplicable.<sup>33</sup>

The primary remedy of a party against whom a default judgment is entered is to bring a rule 60(b) motion to set aside the judgment in the trial court.<sup>34</sup> Rule 60(b) provides six grounds for relief from final judgments:

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for excluding a judgment by default from the applicability of Rule 60(b)." 6A J. Moore, *Federal Practice* ¶ 60.03[5], at 4032 (2d ed. 1979).

31. *E.g.*, *Misco Leasing, Inc. v. Vaughn*, 450 F.2d 257, 260 (10th Cir. 1971) (default judgment set aside because court lacked in personam jurisdiction due to insufficient contacts with the forum state); *Hicklin v. Edwards*, 226 F.2d 410, 413 (8th Cir. 1955) (default judgment set aside because movant had not been served); *Williams v. Capital Transit Co.*, 215 F.2d 487, 490 (D.C. Cir. 1954) (same); *see* 7 J. Moore, *Federal Practice* ¶ 60.25[2], at 309 (2d ed. 1979); 10 C. Wright & A. Miller, *supra* note 10, § 2695, at 325-26.

32. *Morris v. Jones*, 329 U.S. 545, 550-51 (1947) ("judgment of a court having jurisdiction of the parties and of the subject matter operates as *res judicata*, in the absence of fraud or collusion, even if obtained upon a default" (citation omitted)); *Moyer v. Mathas*, 458 F.2d 431, 434 (5th Cir. 1972) ("judgment is no less *res judicata* because it was obtained by default, absent any proof of fraud, collusion, or lack of jurisdiction"); *United States v. Martin*, 395 F. Supp. 954, 959 (S.D.N.Y. 1975) ("the rule of *res judicata* is rendered no less inexorable by the fact that the judgment may have been taken by default"); *see* 1B J. Moore, *Federal Practice* ¶ 0.409[4], at 1024-25 (2d ed. 1980).

33. *Compare* *Cromwell v. County of Sac*, 94 U.S. 351, 356 (1876) (default judgment does not make allegations of complaint evidence in action on different claim) *and* *United States v. Martin*, 395 F. Supp. 954, 959-60 (S.D.N.Y. 1975) (default judgment has no collateral estoppel effect because nothing was actually litigated) *with* *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U.S. 683, 695 (1895) (default judgment binding as to all facts by estoppel). Professor Moore argues that the predominant and better view is that a default judgment has no collateral estoppel effect. 1B J. Moore, *Federal Practice* ¶ 0.444[2], at 4006 (2d ed. 1980). *But cf.* *I.T.S. Rubber Co. v. Essex Rubber Co.*, 25 F.2d 180, 185 (D. Mass. 1922) (doctrines of *res judicata* and collateral estoppel do not apply to interlocutory act of entry of default); 6 J. Moore, *Federal Practice* ¶ 55.03[2], at 55-33 (2d ed. 1976) (same).

34. 6 J. Moore, *Federal Practice* ¶ 55.09, at 55-201 (2d ed. 1976); 9 J. Moore, *Federal Practice* ¶ 203.06, at 3-27 to -28 (2d ed. 1980); 10 C. Wright & A. Miller, *supra* note 10, § 2692, at 296. Rule 55(c) provides that "if a judgment by default has been entered, [the court] may . . . set it aside in accordance with Rule 60(b)." Fed. R. Civ. P. 55(c). Professor Moore explains that a party against whom a default judgment has been taken "must move in the trial court to set aside the judgment; he cannot draw the facts in issue by appealing directly from the default judgment, because on the record they stand confessed." 9 J. Moore, *Federal Practice* ¶ 203.06, at 3-27 to -28 (2d ed. 1980). A party may, however, appeal directly from a void judgment or from one not authorized by rule 55. 6 J. Moore, *Federal Practice* ¶ 55.09, at 55-201 (2d ed. 1976); 9 J. Moore, *Federal Practice* ¶ 203.06, at 3-27 to -28 (2d ed. 1980).

(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.<sup>35</sup>

Although rule 60(b) applies to all final judgments,<sup>36</sup> not all of the above grounds are relevant in the context of setting aside default judgments. No default judgment cases were found to have been decided under subdivisions (2) and (5). The cases involving consideration of subdivisions (3) and (4) are beyond the scope of this Project because they involve considerations not relevant to the bulk of default judgment cases. Moreover, under these subdivisions, the trial court judge does not have the broad discretion that he has in disposing of cases brought under subdivisions (1) and (6),<sup>37</sup> which are the primary grounds for setting aside default judgments.

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35. Fed. R. Civ. P. 60(b).

36. See note 30 *supra*.

37. See pt. I(B) *infra*. Although some motions have been brought under subdivision (3), movants have had difficulty in establishing the existence of fraud with the required "clear and convincing" evidence. *E.g.*, *Brown v. McCormick*, 608 F.2d 410, 414 (10th Cir. 1979); *United States v. An Undetermined Quantity of an Article of Drug Labeled as Benylin Cough Syrup*, 583 F.2d 942, 948 (7th Cir. 1978) (*per curiam*); *Nederlandsche Handel-Maatschappij, N.V. v. Jay Emm, Inc.*, 301 F.2d 114, 115 (2d Cir. 1962); *Assmann v. Fleming*, 159 F.2d 332, 336-37 (8th Cir. 1947); *Jackson v. Heiser*, 111 F.2d 310, 312-13 (9th Cir. 1940); *Allen v. Jacobson*, 82 F.R.D. 355, 358 (N.D. Tex. 1979); *Hartford Accident and Indem. Co. v. Smeck*, 78 F.R.D. 537, 540 (E.D. Pa. 1978). In approximately 10% of the reported cases, the court lacked jurisdiction, thus rendering the default judgment or entry of default void. In some cases, the court lacked subject matter jurisdiction. *E.g.*, *Hale v. McCall*, 425 F. Supp. 396, 399 (E.D. Tenn. 1976) (default); *Carignan v. United States*, 48 F.R.D. 323, 326 (D. Mass. 1969) (default). In other cases, the court lacked *in personam* jurisdiction due to invalid service of process. *E.g.*, *Hicklin v. Edwards*, 226 F.2d 410, 413 (8th Cir. 1955); *Williams v. Capital Transit Co.*, 215 F.2d 487, 489-90 (D.C. Cir. 1954); *Gray v. Permanent Mission of the People's Republic of the Congo to the U.N.*, 443 F. Supp. 816, 821 (S.D.N.Y.), *aff'd mem.*, 580 F.2d 1044 (2d Cir. 1978); *Thorne v. Pennsylvania*, 77 F.R.D. 396, 398 (E.D. Pa. 1977); *Phillips v. Flynn*, 61 F.R.D. 574, 577 (E.D. Pa. 1974) (default); *Kadet-Kruger & Co. v. Celanese Corp. of Am.*, 216 F. Supp. 249, 250 (N.D. Ill. 1963) (default); *Bruce v. Paxton*, 31 F.R.D. 197, 200-01 (E.D. Ark. 1962). Finally, in some cases, the court lacked *in personam* jurisdiction due to the defendant's insufficient contacts with the forum state. *E.g.*, *Misco Leasing, Inc. v. Vaughn*, 450 F.2d 257, 260 (10th Cir. 1971); *DiCesare-Engler Prods., Inc. v. Mainman Ltd.*, 81 F.R.D. 703, 705-07 (W.D. Pa. 1979); *United States v. Wahl*, 406 F. Supp. 1396, 1400 (E.D. Mich. 1976); *Graciette v. Star Guidance, Inc.*, 66 F.R.D. 424, 426 (S.D.N.Y. 1975); *Ruddies v. Auburn Spark Plug Co.*, 261 F. Supp. 648, 657 (S.D.N.Y. 1966). In some cases, the courts did not

Apart from satisfying one or more of the rule 60(b) grounds for setting aside a default judgment, a movant may have to meet additional judicially established requirements. Almost all courts require that the movant present a meritorious defense to the underlying action.<sup>38</sup> Moreover, many require that the movant show lack of prejudice to the non-defaulting party.<sup>39</sup> The weight accorded each of these requirements, however, varies considerably and depends to a great extent on how the trial court views the goals of the Federal Rules.

### B. *Competing Goals of the Federal Rules and Discretion of the Courts*

The disposition of a motion to set aside either a default or a default judgment involves a reconciliation of two competing and conflicting goals of the Federal Rules of Civil Procedure.<sup>40</sup> On the one hand, the goal of preserving the finality of judgments and of promoting prompt and efficient litigation in the federal courts militates against

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specifically state that the judgment was void, but merely implied such a conclusion. *E.g.*, *Ziegler v. United States*, 86 F.R.D. 703, 707 & n.12 (E.D. Pa. 1980) (default); *Huntington Cab Co. v. American Fidelity & Cas. Co.*, 4 F.R.D. 496, 498 (S.D.W. Va. 1945). Once lack of jurisdiction is established, neither the timeliness of the motion, *e.g.*, *Misco Leasing, Inc. v. Vaughn*, 450 F.2d 257, 260 (10th Cir. 1971); *Williams v. Capital Transit Co.*, 215 F.2d 487, 489-90 (D.C. Cir. 1954); *Ruddies v. Auburn Spark Plug Co.*, 261 F. Supp. 648, 658 (S.D.N.Y. 1966); *see* 3 W. Barron & A. Holtzoff, *Federal Practice and Procedure* § 1327, at 412-13 (C. Wright ed. 1955), nor the merits of the movant's defense to the suit is considered. *E.g.*, *Hicklin v. Edwards*, 226 F.2d 410, 413 (8th Cir. 1955); *Carignan v. United States*, 48 F.R.D. 323, 325 (D. Mass. 1969) (default).

38. *See* pt. III(A) *infra*.

39. *See* pt. III(B) *infra*.

40. *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970) ("The preferred disposition of any case is upon its merits and not by default judgment . . . . However, this judicial preference is counterbalanced by considerations of social goals, justice and expediency, a weighing process which lies largely within the domain of the trial judge's discretion." (citation and footnotes omitted)); *Spica v. Garzynski*, 78 F.R.D. 134, 136 (E.D. Pa. 1978) (default) ("The resolution of this motion involves making a choice between the two conflicting policies of prompt and efficient handling of litigation in the Federal Courts by reasonably strict enforcement of the F.R.C.P., and the interests of justice which are normally served by a trial on the merits."); *Bell. Tel. Labs., Inc. v. Hughes Aircraft Co.*, 73 F.R.D. 16, 22 (D. Del. 1976) ("The Court must balance the need for prompt and efficient handling of litigation in the federal courts, in accordance with the Federal Rules, against the attainment of a just resolution of a particular dispute before the court."); *Ledwith v. Storkan*, 2 F.R.D. 539, 541 (D. Neb. 1942) (The trial court judge "must recognize at the same time, both that the objective of legal procedure is the determination of issues upon their merits instead of upon refinements of procedure, and also that litigants and their counsel may not properly be allowed with impunity to disregard the process of the court."); *see* 6 J. Moore, *Federal Practice* ¶ 55.10[4], at 55-251 (2d ed. 1976).

setting aside default judgments.<sup>41</sup> On the other hand, the notion that the Federal Rules should be liberally construed so that decisions are made on the merits of cases rather than on "procedural niceties" militates in favor of setting aside default judgments.<sup>42</sup> Rule 1 of the Federal Rules provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."<sup>43</sup> In the context of default judgments, however, a speedy determination is not always compatible with a just determination. The trial court to which the motion for relief is addressed must decide which goal should be accorded greater weight given the circumstances of the case.<sup>44</sup>

Because default judgments are not favored in the law,<sup>45</sup> most courts agree that the rules governing the setting aside of defaults and default judgments should be liberally construed<sup>46</sup> whenever possible so that

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41. One court has cautioned that without procedures for efficient processing of cases when a party is in default, there will be "a hopeless backlog and glacial disposition of cases." *Kostenbauder v. Secretary, HEW*, 71 F.R.D. 449, 453 (M.D. Pa. 1976), *aff'd mem. sub nom. Kostenbauder v. Weinberger*, 556 F.2d 567 (3d Cir. 1977). In *Canup v. Mississippi Valley Barge Line Co.*, 31 F.R.D. 282 (W.D. Pa. 1962) (default) the court noted that "[o]ne of the basic purposes of the Rules of Federal Procedure is to secure the 'speedy' determination of pending litigation." *Id.* at 283. The court went on to state that "[c]alendar control by the Courts and the setting of fixed dates for the various steps to be taken in the course of litigation are among the means by which it is sought to eliminate delay. The bar must realize, and we declare it as emphatically as we can, that these dates fixed by law, rule, or court order mean something. They are not empty formalities. To neglect and ignore a date for action in a court proceeding is in reality a thinly-veiled species of disrespect or contempt for the Court." *Id.*; *accord*, *H & F Barge Co. v. Garber Bros.*, 71 F.R.D. 5, 10 (E.D. La. 1974), *aff'd*, 534 F.2d 1103 (5th Cir. 1976) (per curiam); *Nelson v. Coleman Co.*, 41 F.R.D. 7, 9 (D.S.C. 1966) (default).

42. *E.g.*, *Schwab v. Bullock's Inc.*, 508 F.2d 353, 355 (9th Cir. 1974); *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 245 (3d Cir. 1951); *Cross v. Fong Eu*, 430 F. Supp. 1036, 1042 n.8 (N.D. Cal. 1977) (default).

43. *Fed. R. Civ. P. 1. Compare Davis v. Parkhill-Goodloe Co.*, 302 F.2d 489 (5th Cir. 1962) *with Kennerly v. Aro, Inc.*, 447 F. Supp. 1083 (E.D. Tenn. 1977). In *Davis*, the court interpreted rule 1 as requiring liberal construction of the rules relating to default judgments, with doubts resolved in favor of a trial on the merits. 302 F.2d at 495. In *Kennerly*, the court, although noting that rule 55(c) is to be liberally construed in light of rule 1, stated that "it is not the purpose of this Court in so doing to subvert the plain provisions of the Rule by such liberality and contributing to its becoming meaningless; it is to be construed . . . 'to secure the just, *speedy* [emphasis supplied], and inexpensive determination of every action.'" 447 F. Supp. at 1087 (quoting *Fed. R. Civ. P. 1.*)

44. *See* note 40 *supra* and accompanying text.

45. *E.g.*, *FTC v. Packers Brand Meats, Inc.*, 562 F.2d 9, 10 (8th Cir. 1977) (per curiam); *Schwab v. Bullock's Inc.*, 508 F.2d 353, 355 (9th Cir. 1974); *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970); *General Tire & Rubber Co. v. Olympic Gardens, Inc.*, 85 F.R.D. 66, 68-69 (E.D. Pa. 1979).

46. *E.g.*, *Schwab v. Bullock's Inc.*, 508 F.2d 353, 355 (9th Cir. 1974); *Greenspun v. Bogan*, 492 F.2d 375, 382 (1st Cir. 1974); *Tolson v. Hodge*, 411 F.2d 123, 130

justice can be achieved by a trial on the merits.<sup>47</sup> Courts often display a repugnancy for deciding cases on technical, procedural grounds, especially when the result involves the severe sanction of a judgment without consideration of the merits.<sup>48</sup> With this predisposition against default judgments in mind, most courts urge that all doubts concerning the setting aside of a default judgment be resolved in favor of a trial on the merits.<sup>49</sup>

A few courts, however, have failed to adopt this liberal attitude.<sup>50</sup> Instead, they assert that relief under rule 60(b) is "extraordinary . . . and may be invoked only upon a showing of exceptional circumstances."<sup>51</sup> Although this proposition may be persuasive when

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(4th Cir. 1969); *Barber v. Turberville*, 218 F.2d 34, 36 (D.C. Cir. 1954); *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 245 (3d Cir. 1951); *United States v. Berger*, 86 F.R.D. 713, 714 (W.D. Pa. 1980); *Standard Grate Bar Co. v. Defense Plant Corp.*, 3 F.R.D. 371, 372 (M.D. Pa. 1944); see 6 J. Moore, *Federal Practice* ¶ 55.10[2], at 55-237 (2d ed. 1976); 7 J. Moore, *Federal Practice* ¶ 60.22[2], at 247 (2d ed. 1979).

47. *E.g.*, *American & Foreign Ins. Ass'n v. Commercial Ins. Co.*, 575 F.2d 980, 982 (1st Cir. 1978); *Schwab v. Bullock's Inc.*, 508 F.2d 353, 355 (9th Cir. 1974); *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970); *Thorpe v. Thorpe*, 364 F.2d 692, 694 (D.C. Cir. 1966); *Patapoff v. Vollstedt's Inc.*, 267 F.2d 863, 865 (9th Cir. 1959); *Rooks v. American Brass Co.*, 263 F.2d 166, 169 (6th Cir. 1959) (per curiam); *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 245 (3d Cir. 1951); *Assmann v. Fleming*, 159 F.2d 332, 336 (8th Cir. 1947); see 6 J. Moore, *Federal Practice* ¶ 55.10[2], at 55-237 (2d ed. 1976).

48. In *Kennerly v. Aro, Inc.*, 447 F. Supp. 1083 (E.D. Tenn. 1977), the court stated that "it is contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of mere technicalities." *Id.* at 1088. The court went on to note that "[t]he Federal Rules of Civil Procedure are designed to prevent federal civil [practice from] becoming . . . 'a game of skill in which one misstep by counsel may be decisive to the outcome . . . [and] . . . to facilitate a proper decision on the merits.'" *Id.* at 1089 (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)); accord, *Cross v. Fong Eu*, 430 F. Supp. 1036, 1042 n.8 (N.D. Cal. 1977).

49. *E.g.*, *Schwab v. Bullock's Inc.*, 508 F.2d 353, 355 (9th Cir. 1974); *Tolson v. Hodge*, 411 F.2d 123, 130 (4th Cir. 1969); *Rooks v. American Brass Co.*, 263 F.2d 166, 169 (6th Cir. 1959) (per curiam); *Hiern v. St. Paul-Mercury Indem. Co.*, 262 F.2d 526, 530 (5th Cir. 1959); *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 245 (3d Cir. 1951); *Bell Tel. Labs., Inc. v. Hughes Aircraft Co.*, 73 F.R.D. 16, 21 (D. Del. 1976); *United States v. Small*, 24 F.R.D. 429, 430 (S.D.N.Y. 1959); *Standard Grate Bar Co. v. Defense Plant Corp.*, 3 F.R.D. 371, 372 (M.D. Pa. 1944); see 6 J. Moore, *Federal Practice* ¶ 55.10[1], at 55-235 to -236 (2d ed. 1976).

50. *E.g.*, *Brown v. McCormick*, 608 F.2d 410, 413 (10th Cir. 1979); *Ben Sager Chems. Int'l, Inc. v. E. Targosz & Co.*, 560 F.2d 805, 809 (7th Cir. 1977). See also *Kostenbauder v. Secretary, HEW*, 71 F.R.D. 449, 450 (M.D. Pa. 1976), *aff'd mem. sub nom.* *Kostenbauder v. Weinberger*, 556 F.2d 567 (3d Cir. 1977); *United States v. \$3,216.59 in United States Currency*, 41 F.R.D. 433, 434 (D.S.C. 1967).

51. *Ben Sager Chems. Int'l, Inc. v. E. Targosz & Co.*, 560 F.2d 805, 809 (7th Cir. 1977) (quoting *DiVito v. Fidelity and Deposit Co.*, 361 F.2d 936, 938 (7th Cir. 1966)); accord, *Brown v. McCormick*, 608 F.2d 410, 413 (10th Cir. 1979); *Kostenbauder v. Secretary, HEW*, 71 F.R.D. 449, 451 (M.D. Pa. 1976), *aff'd mem. sub nom.* *Kostenbauder v. Weinberger*, 556 F.2d 567 (3d Cir. 1977); *United States v. \$3,216.59 in United States Currency*, 41 F.R.D. 433, 434 (D.S.C. 1967).

sive when rule 60(b) is applied in the context of setting aside judgments rendered after consideration of the merits, it is too harsh when the judgment sought to be set aside has been entered by default.<sup>52</sup>

Despite the pervasiveness of the view that the rule is to be liberally construed when applied to default judgments, in approximately 51% of the reported cases dealing with motions to set aside default judgments, the motions have been denied.<sup>53</sup> These results show that set aside motions are not granted pro forma as an indulgence or courtesy to the party in default.<sup>54</sup> Instead, rule 60(b) provides an effective and flexible means of denying some defaulters access to the court.<sup>55</sup>

The decision whether to set aside a default judgment rests within the sound discretion of the trial court.<sup>56</sup> The existence of some dis-

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52. *E.g.*, *Bell Tel. Labs., Inc. v. Hughes Aircraft Co.*, 73 F.R.D. 16 (D. Del. 1976). The court found that "[w]hen applied to default judgments, the standards of Rule 60(b) are generally interpreted with greater liberality, and doubts resolved in favor of the moving party, in view of the preference for consideration of a case on its merits." *Id.* at 21.

53. Motions for relief were denied in 76 of the 149 cases involving motions to set aside default judgments. (Statistics on file with the *Fordham Law Review*). In contrast, in approximately 41% of the reported cases dealing with motions to set aside defaults the motions have been denied. Such motions were denied in 28 of the 68 cases surveyed. (Statistics on file with the *Fordham Law Review*). These results confirm the notion that courts are somewhat more lenient in treating motions to set aside defaults than they are in treating motions to set aside default judgments, although the same considerations are addressed in disposing of both types of motions. See note 21 *supra*.

54. In *Gomes v. Williams*, 420 F.2d 1364 (10th Cir. 1970), the court affirmed the lower court's denial of a motion to set aside a default judgment, finding that "the trial court ought not reopen a default judgment simply because a request is made by the defaulting party." *Id.* at 1366. In *Ledwith v. Storkan*, 2 F.R.D. 539 (D. Neb. 1942), the court denied a motion to set aside a default judgment, finding that "[t]he vacation of a default judgment duly entered without fraud or overreaching, is not an action which the court should take arbitrarily or as a courtesy or favor to the losing party." *Id.* at 544. Emphasizing the importance of judicial economy, the court went on to contend that "the admonition towards indulgence in the exercise of an allowable discretion must not betray the court into a meddling manifestation of assumed discretion in circumstances which, under the rules, do not bring discretion into operation." *Id.* at 545.

55. Furthermore, the possibility of a default judgment may act as a deterrent to potentially slipshod attorneys and defending parties. *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970) (*per curiam*).

56. All of the Circuits have recognized the propriety of this approach. *American & Foreign Ins. Ass'n v. Commercial Ins. Co.*, 575 F.2d 980, 982 (1st Cir. 1978); *FTC v. Packers Brand Meats, Inc.*, 562 F.2d 9, 10 (8th Cir. 1977) (*per curiam*); *United States v. Cirami*, 535 F.2d 736, 739 (2d Cir. 1976), *rev'd on other grounds*, 563 F.2d 26 (2d Cir. 1977); *Savarese v. Edrick Transfer & Storage, Inc.*, 513 F.2d 140, 146 (9th Cir. 1975); *Wokan v. Alladin Int'l, Inc.*, 485 F.2d 1232, 1234 (3d Cir. 1973); *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970); *Consolidated Masonry & Fireproofing, Inc. v. Wagman Constr. Corp.*, 383 F.2d 249, 251 (4th Cir. 1967); *Hughes v. Holland*, 320 F.2d 781, 782 n.2 (D.C. Cir. 1963); *Hiern v. St.*

cretion is necessary in light of the many unique factual contexts that occur and the need to balance properly the competing goals of the Federal Rules.<sup>57</sup> Because trial courts resolve the tension in the rules in different ways, their notions of the scope of permissible discretion vary accordingly.

Although this discretion is broad,<sup>58</sup> it is not absolute and may not be exercised arbitrarily or capriciously.<sup>59</sup> This is illustrated by the significant number of appellate decisions in which an abuse of discretion has been found.<sup>60</sup> Of the appellate cases found, approximately 44% reversed trial courts' denials of motions for relief.<sup>61</sup> None of the appellate decisions, however, overturned as an abuse of discretion the trial court's granting of a motion for relief from a default judgment. In total, the trial court's discretion has been upheld in approx-

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Paul-Mercury Indem. Co., 262 F.2d 526, 530 (5th Cir. 1959); *Smith v. Kincaid*, 249 F.2d 243, 245 (6th Cir. 1957); *Rutland Transit Co. v. Chicago Tunnel Terminal Co.*, 233 F.2d 655, 657 (7th Cir. 1956).

57. The parameters of good cause, excusable neglect, and other rule 60(b) grounds for relief are not, and perhaps cannot be, so precisely defined as to eliminate the need for the exercise of discretion. Such terms are not defined in the rules. Instead, the parameters of the grounds for relief were left to be established by case law. As the court noted in *Trueblood v. Grayson Shops, Inc.*, 32 F.R.D. 190 (E.D. Va. 1963), "[t]here is no uniform interpretation of what constitutes 'mistake, inadvertance, surprise, or excusable neglect.' Perhaps the terms are not capable of more precise definition." *Id.* at 195.

58. *E.g.*, *Provident Security Life Ins. Co. v. Gorsuch*, 323 F.2d 839, 842 (9th Cir. 1963) (abuse of discretion requires a showing that the district court was "clearly wrong"), *cert. denied*, 376 U.S. 950 (1964); *Nederlandsche Handel-Maatschappij, N.V. v. Jay Emm, Inc.*, 301 F.2d 114, 115 (2d Cir. 1962) ("[W]e would be loathe to substitute our judgment for that of the trial judge."); *International Corporate Enterprises v. Toshoku Ltd.*, 71 F.R.D. 215, 217 (N.D. Tex. 1976) (discretion is broad).

59. *E.g.*, *Assmann v. Fleming*, 159 F.2d 332, 336 (8th Cir. 1947); *Security Trust & Sav. Bank v. Walsh*, 91 F.2d 481, 484 (9th Cir. 1937); *Ledwith v. Storkan*, 2 F.R.D. 539, 541 (D. Neb. 1942).

60. On appeal, the standard of review of dispositions of motions to set aside both defaults and default judgments is abuse of discretion. All of the Circuits have recognized abuse of discretion as the proper standard. *Olson v. Stone*, 588 F.2d 1316, 1321 (10th Cir. 1978); *FTC v. Packers Brand Meats, Inc.*, 562 F.2d 9, 10 (8th Cir. 1977); *Ben Sager Chems. Int'l, Inc. v. E. Targosz & Co.*, 560 F.2d 805, 809 (7th Cir. 1977); *Greenspun v. Bogan*, 492 F.2d 375, 377, 383 (1st Cir. 1974); *Wokan v. Alladin Int'l, Inc.*, 485 F.2d 1232, 1234 (3d Cir. 1973); *United States v. Erdoss*, 440 F.2d 1221, 1223 (2d Cir.), *cert. denied*, 404 U.S. 849 (1971); *Consolidated Masonry & Fireproofing, Inc. v. Wagman Constr. Corp.*, 383 F.2d 249, 251 (4th Cir. 1967); *Patapoff v. Vollstedt's Inc.*, 267 F.2d 863, 865 (9th Cir. 1959); *Hiern v. St. Paul-Mercury Indem. Co.*, 262 F.2d 526, 530 (5th Cir. 1959); *Smith v. Kincaid*, 249 F.2d 243, 245 (6th Cir. 1957); *Bridoux v. Eastern Air Lines, Inc.*, 214 F.2d 207, 210 (D.C. Cir.), *cert. denied*, 348 U.S. 821 (1954).

61. Sixty-six appellate decisions involved appeals from trial courts' denials of motions to set aside default judgments. Trial courts' denials were reversed in 29 of the 66 cases. (Statistics on file with the *Fordham Law Review*).

imately 60% of the reported cases.<sup>62</sup> Because only denials of rule 60(b) motions have been reversed, it appears that appellate courts have in fact functioned as a check on trial courts that fail to construe the rules with sufficient liberality by resolving the tension in the rules too one-sidedly in favor of judicial economy.<sup>63</sup>

## II. SETTING ASIDE DEFAULT JUDGMENTS UNDER RULES 55 AND 60

### A. Rule 60(b)(1)

The discussion of setting aside default judgments logically begins with an analysis of the requirements specifically set forth in the Federal Rules. Rule 60(b)(1) outlines the grounds under which most motions to set aside default judgments are made.<sup>64</sup> It provides that a judgment may be set aside upon a showing that it was obtained through the "mistake, inadvertence, surprise or excusable neglect" of the movant.<sup>65</sup> When used to set aside default judgments, this subsection has been interpreted by the courts as requiring a party to justify his delay or that of his attorney in pleading or "otherwise" defending.<sup>66</sup> To qualify under rule 60(b)(1), the motion must be filed within a "reasonable time" and in no case may a motion be filed under this subdivision if more than one year has elapsed since entry of the judgment.<sup>67</sup>

Because a default judgment is entered after a delay in pleading or otherwise defending, the majority of cases begin with a discussion of

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62. Seventy-three appellate decisions involved appeals from trial courts' dispositions of motions to set aside default judgments. The trial courts' discretion was upheld in 44 of the 73 cases. (Statistics on file with the *Fordham Law Review*).

63. *E.g.*, *Medunic v. Lederer*, 533 F.2d 891, 893 (3d Cir. 1976); *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 245 (3d Cir. 1951).

64. According to our survey, approximately 80% of the reported cases are decided under subdivision (1).

65. Fed. R. Civ. P. 60(b)(1).

66. *See* *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970); *Provident Security Life Ins. Co. v. Gorsuch*, 323 F.2d 839, 842 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964); *United States v. Berger*, 86 F.R.D. 713, 714 (W.D. Pa. 1980); *Horn v. Intelectron Corp.*, 294 F. Supp. 1153, 1154-55 (S.D.N.Y. 1968); *Trueblood v. Grayson Shops, Inc.*, 32 F.R.D. 190, 195-96 (E.D. Va. 1963). *See generally* 11 C. Wright & A. Miller, *supra* note 10, § 2858.

67. Fed. R. Civ. P. 60(b). The court in *Usery v. Weiner Bros.*, 70 F.R.D. 615 (D. Conn. 1976), noted that "the year is not absolute; it is simply the maximum, and laches or undue delay will bar relief, even though the motion is made within one year." *Id.* at 616. The movant has the added burden of showing that his motion was timely filed. *E.g.*, *Central Operating Co. v. Utility Workers of Am.*, 491 F.2d 245, 252-53 (4th Cir. 1974) (delay in seeking relief inexcusable); *Thorpe v. Thorpe*, 364 F.2d 692, 694 (D.C. Cir. 1966) (movant "acted promptly to vacate the default judgment").



whether the movant has shown a satisfactory excuse for this delay.<sup>68</sup> Many courts will not consider any other factors, such as the merits of the movant's defense, unless this threshold issue is satisfactorily resolved.<sup>69</sup> Logically, if the delay is inexcusable, it does not meet the requirements set forth in the rule for setting aside the default judgment, and the court should deny the motion. Because this approach overemphasizes concern for judicial economy at the expense of a trial on the merits,<sup>70</sup> however, some courts have held that to dispose of

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68. *E.g.*, *Tolson v. Hodge*, 411 F.2d 123, 129-30 (4th Cir. 1969); *Hutton v. Fisher*, 359 F.2d 913, 915 (3d Cir. 1966); *Altschul v. Paine Webber, Inc.*, 488 F. Supp. 858, 859-60 (S.D.N.Y. 1980) (default); *Caruso v. Drake Motor Lines, Inc.*, 78 F.R.D. 586, 588 (E.D. Pa. 1978); *United States v. Topeka Livestock Auction, Inc.*, 392 F. Supp. 944, 950-51 (N.D. Ind. 1975) (default); *Horn v. Intelectron Corp.*, 294 F. Supp. 1153, 1155-56 (S.D.N.Y. 1968); *Byron v. Bleakley Transp. Co.*, 43 F.R.D. 413, 415 (S.D.N.Y. 1967); *Wagg v. Hall*, 42 F.R.D. 589, 590-91 (E.D. Pa. 1967). *But see* *General Tire & Rubber Co. v. Olympic Gardens, Inc.*, 85 F.R.D. 66, 69-70 (E.D. Pa. 1979); *Rasmussen v. W.E. Hutton & Co.*, 68 F.R.D. 231, 234 (N.D. Ca. 1975) (default); *Robinson v. Bantam Books, Inc.*, 49 F.R.D. 139, 140-41 (S.D.N.Y. 1970) (default).

69. *E.g.*, *Ben Sager Chems. Int'l, Inc. v. E. Targosz & Co.*, 560 F.2d 805, 809 (7th Cir. 1977); *Davis v. Safeway Stores, Inc.*, 532 F.2d 489, 490 (5th Cir. 1976) (per curiam); *Baez v. S.S. Kresge Co.*, 518 F.2d 349, 350 (5th Cir. 1975) (per curiam), *cert. denied*, 425 U.S. 904 (1976); *Dolphin Plumbing Co. v. Financial Corp. of N. Am.*, 508 F.2d 1326, 1327 (5th Cir. 1975) (per curiam); *Standard Newspapers, Inc. v. King*, 375 F.2d 115, 116 (2d Cir. 1967) (per curiam); *Cliff v. PPX Publishing Co.*, 84 F.R.D. 369, 371 (S.D.N.Y. 1979); *International Corporate Enterprises v. Toshoku Ltd.*, 71 F.R.D. 215, 217 (N.D. Tex. 1976); *Medunic v. Lederer*, 64 F.R.D. 403, 405-06 (E.D. Pa. 1974) (default), *rev'd*, 533 F.2d 891, 893 (3d Cir. 1976); *Scanor v. Bair Transp. Co.*, 54 F.R.D. 35, 36 (E.D. Pa. 1971) (default); *Titus v. Smith*, 51 F.R.D. 224, 226 (E.D. Pa. 1970) (default); *Hutton v. Fisher*, 35 F.R.D. 167, 168-69 (E.D. Pa. 1964), *vacated and remanded*, 359 F.2d 913 (3d Cir. 1966); *Canup v. Mississippi Valley Barge Line Co.*, 31 F.R.D. 282, 284 (W.D. Pa. 1962) (default); *Anderson v. Taylorcraft, Inc.*, 197 F. Supp. 872, 873-74 (W.D. Pa. 1961); *United States v. Willenbrock*, 152 F. Supp. 431 (E.D. Pa. 1957); *Italian Cook Oil Corp. v. Charles A. Krause Milling Co.*, 10 F.R.D. 510, 511-12 (E.D. Pa. 1950), *rev'd sub nom.* *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242 (3d Cir. 1951). Some courts acknowledge or assume the presence of a meritorious defense, but state that the inexcusability of the delay controls. *E.g.*, *Central Operating Co. v. Utility Workers of Am.*, 491 F.2d 245, 252 (4th Cir. 1974); *Rutland Transit Co. v. Chicago Tunnel Terminal Co.*, 233 F.2d 655, 659 (7th Cir. 1956); *Spica v. Garczynski*, 78 F.R.D. 134, 136 (E.D. Pa. 1978) (default); *Caputo v. Globe Indem. Co.*, 41 F.R.D. 436, 439 (E.D. Pa. 1967); *United States v. \$3,216.59 in United States Currency*, 41 F.R.D. 433, 436 (D.S.C. 1967); *Nelson v. Coleman Co.*, 41 F.R.D. 7, 9-10 (D.S.C. 1966) (default); *Anderson v. Taylorcraft, Inc.*, 197 F. Supp. 872, 874 (W.D. Pa. 1961); *Morrissey v. Crabtree*, 143 F. Supp. 105, 106 (M.D.N.C. 1956); *Ledwith v. Storkan*, 2 F.R.D. 539, 544 (D. Neb. 1942). *But see* *New York State Health Facilities Ass'n v. Carey*, 76 F.R.D. 128, 133 (S.D.N.Y. 1977). In *Carey*, the delay was held inexcusable, but the court held that granting the set aside motion was justified because the movant had a meritorious defense and the state taxpayers would suffer from the default judgment.

70. For example, in *Dolphin Plumbing Co. v. Financial Corp. of N. Am.*, 508 F.2d 1326 (5th Cir. 1975) (per curiam), the court acknowledged "the strong policy in

dispose of the motion properly, the merits of the defense and the excusability of the delay should be considered in tandem.<sup>71</sup> If the defense to the suit is particularly meritorious, a court may be more inclined to excuse the delay.<sup>72</sup>

Regardless of the merits of the defense, few courts will tolerate a willful and egregious disrespect for court procedures.<sup>73</sup> Thus, before a court will grant a set aside motion, the excuses offered must indicate an underlying element of good faith.<sup>74</sup> Actions undercutting good faith include undue delay in responding to the complaint<sup>75</sup> or in

favor of trial on the merits," but denied the motion stating that "we are equally aware of the district court's duty to protect the integrity of the judicial process." *Id.* at 1327. In *Nelson v. Coleman Co.*, 41 F.R.D. 7 (D.S.C. 1966) (default), the court noted that although "the policy of the law favors adjudication on the merits . . . the process of the court is neither to be disregarded or ignored." *Id.* at 9 (citation omitted).

71. *E.g.*, *Schwab v. Bullock's Inc.*, 508 F.2d 353, 355 (9th Cir. 1974); *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 244-45 (3d Cir. 1951); *Brogie v. Mackay-Smith*, 75 F.R.D. 739, 742 (W.D. Va. 1977) (default); *Mitchell v. Eaves*, 24 F.R.D. 434, 435 (E.D. Tenn. 1959) (default).

72. *See* cases cited note 71 *supra*.

73. Default judgments entered due to violation of the discovery procedure pursuant to rule 37 are particularly illustrative of judicial intolerance of such behavior. Few motions to set aside such judgments are granted. *See Brown v. McCormick*, 608 F.2d 410, 414 (10th Cir. 1979) (motion denied); *Ben Sager Chems. Int'l, Inc. v. E. Targosz & Co.*, 560 F.2d 805, 811 (7th Cir. 1977) (same); *Wilver v. Fisher*, 387 F.2d 66, 69 (10th Cir. 1967) (motion granted); *Pioche Mines Consol., Inc. v. Dolman*, 333 F.2d 257, 269 (9th Cir. 1964) (motion denied), *cert. denied*, 380 U.S. 956 (1965); *A-Plus Answering Serv., Inc. v. Elmhurst Answering Exch., Inc.*, 74 F.R.D. 157, 158 (E.D.N.Y. 1977) (same); *Aberson v. Glassman*, 70 F.R.D. 608, 684 (S.D.N.Y. 1976) (default) (same); *Seanor v. Bair Transp. Co.*, 54 F.R.D. 35, 36 (E.D. Pa. 1971) (default) (same); *Hendricks v. Alcoa S.S. Co.*, 32 F.R.D. 169, 173 (E.D. Pa. 1963) (motion granted subject to satisfaction of conditions); *United States v. Fong*, 182 F. Supp. 446, 449-50 (N.D. Cal. 1959) (default) (motion denied), *aff'd*, 300 F.2d 400 (9th Cir.), *cert. denied*, 370 U.S. 938 (1962); *Saltzman v. Birrell*, 156 F. Supp. 538, 540 (S.D.N.Y. 1957) (same); *Gill v. Stollow*, 18 F.R.D. 508, 509 (S.D.N.Y. 1955) (same), *rev'd*, 240 F.2d 669 (2d Cir. 1957). In reversing the lower court's denial of the motion, the appellate court in *Gill* held that the circumstances "demonstrate that [the movant's] default . . . was not properly to be characterized as willful." 240 F.2d at 672.

74. *E.g.*, *Provident Security Life Ins. Co. v. Gorsuch*, 323 F.2d 839, 842-43 (9th Cir. 1963) (good faith demonstrated by evidence of movant's intent to defend the action), *cert. denied*, 376 U.S. 950 (1964); *Horn v. Intelectron Corp.*, 294 F. Supp. 1153, 1155 (S.D.N.Y. 1968) (good faith demonstrated because movant was unaware of the suit but "[p]romptly upon verifying the existence of the action . . . brought this motion to set aside the default judgment").

75. *E.g.*, *Residential Reroofing Union Local 30-B v. Mezicco*, 55 F.R.D. 516, 518 (E.D. Pa. 1972) (failure to act for three years held inexcusable); *Titus v. Smith*, 51 F.R.D. 224, 226 (E.D. Pa. 1970) (default) ("failure to act over a period of approximately one year and ten months . . . can only be condemned as gross and inexcusable neglect"); *Wagg v. Hall*, 42 F.R.D. 589, 590 (E.D. Pa. 1967) (failure to act for two and one half years held inexcusable); *Anderson v. Taylorcraft, Inc.*, 197 F. Supp.

filing the motion,<sup>76</sup> failure to obey court orders,<sup>77</sup> or presentation of evidence that conceals more than it reveals.<sup>78</sup> Similarly, courts are not favorably disposed to grant a motion to set aside a default judgment that the movant allowed to be entered in a deliberate, though misguided, tactical move.<sup>79</sup>

### 1. The Movant's Unawareness of the Suit

The movant's unawareness of the suit until after the entry of the default judgment<sup>80</sup> is sometimes the basis for the set aside motion. To justify relief in this situation, the movant must adequately establish not only that his ignorance was due to innocent or excusably negligent conduct, but also that he filed the set aside motion within a reasonable time after discovery of the existence of the suit.<sup>81</sup> Failure

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872, 874 (W.D. Pa. 1961) (failure to act for two and one half years constituted "supine and inexcusable neglect").

76. *E.g.*, *Pennsylvania Nat'l Bank & Trust Co. v. American Home Assurance Co.*, 87 F.R.D. 152, 156 (E.D. Pa. 1980) (six and one half month delay in filing motion held inexcusable); *Allen v. Jacobson*, 82 F.R.D. 355, 357 (N.D. Tex. 1979) (if movant had filed set aside motion promptly after learning of default judgment, rather than waiting 21 months, "she could very probably have achieved her aim"); *Spica v. Garczynski*, 78 F.R.D. 134, 135-36 (E.D. Pa. 1978) (default) (motion denied because a three month delay, though "not excessive," was not "'quick action'"). A court will show little sympathy for a movant who fails to file a set aside motion until after the opposing party seeks to execute the judgment. *E.g.*, *Standard Newspapers, Inc. v. King*, 375 F.2d 115, 116 (2d Cir. 1967) (per curiam); *H & F Barge Co. v. Garber Bros.*, 71 F.R.D. 5, 6 (E.D. La. 1974), *aff'd*, 534 F.2d 1103 (5th Cir. 1976) (per curiam).

77. *E.g.*, *Dolphin Plumbing Co. v. Financial Corp. of N. Am.*, 508 F.2d 1326, 1328 (5th Cir. 1974) (per curiam); *Collex, Inc. v. Walsh*, 69 F.R.D. 20, 22 (E.D. Pa. 1975).

78. *E.g.*, *Jones v. Jones*, 217 F.2d 239, 242 (7th Cir. 1954).

79. *E.g.*, *United States v. An Undetermined Quantity of an Article of Drug Labeled as Benylin Cough Syrup*, 583 F.2d 942, 947 (7th Cir. 1978) (per curiam); *United States v. Erdoss*, 440 F.2d 1221, 1222-23 (2d Cir.), *cert. denied*, 404 U.S. 849 (1971); *Vega Matta v. Alvarez de Choudens*, 440 F. Supp. 246, 249 (D.P.R. 1977) (default), *aff'd mem.*, 577 F.2d 722 (1st Cir. 1978).

80. *E.g.*, *Schwab v. Bullock's Inc.*, 508 F.2d 353, 355 (9th Cir. 1974); *Standard Newspapers, Inc. v. King*, 375 F.2d 115, 116 (2d Cir. 1967) (per curiam); *Rooks v. American Brass Co.*, 263 F.2d 166, 167-68 (6th Cir. 1959) (per curiam); *Smith v. Kincaid*, 249 F.2d 243, 245 (6th Cir. 1957); *United States v. \$3,976.62 in Currency*, 37 F.R.D. 564, 566 (S.D.N.Y. 1965); *Necchi Sewing Mach. Sales Corp. v. Sewline Co.*, 194 F. Supp. 602, 605 (S.D.N.Y. 1960) (default).

81. *Compare* *Central Operating Co. v. Utility Workers of Am.*, 491 F.2d 245, 252-53 (4th Cir. 1974) (movant had acceptable excuse for lapsing into default but delay in seeking relief held inexcusable) *with* *Associated Press v. J.B. Broadcasting, Ltd.*, 54 F.R.D. 563, 564 (D. Md. 1972) (movant acted with "reasonable promptness" in filing set aside motion but offered "no adequate excuse for its failure . . . to prevent the default"). *But see* *Beacon Gasoline Co. v. Sun Oil Co.*, 73 F.R.D. 505 (W.D. La. 1977) (default). In *Beacon*, the court stated that the movants had been

to file promptly has been held to be an alternative independent ground for denying the motion.<sup>82</sup>

A movant often supports his claim of unawareness by attacking the method of service of the summons and complaint.<sup>83</sup> Even if the court upholds the service as valid,<sup>84</sup> the method employed may provide a valid excuse for the movant's ignorance of the suit.<sup>85</sup> For example, in

"extremely dilatory" in responding to the suit, but held that "it would be too harsh to maintain the defaults in the face of their apparent readiness now." *Id.* at 506.

82. *Central Operating Co. v. Utility Workers of Am.*, 491 F.2d 245, 253 (4th Cir. 1974); see cases cited notes 75, 76 *supra*.

83. *Schwab v. Bullock's Inc.*, 508 F.2d 353, 355 (9th Cir. 1974); *Smith v. Kincaid*, 249 F.2d 243, 245 (6th Cir. 1957); *Hicklin v. Edwards*, 226 F.2d 410, 414 (8th Cir. 1955); *Jones v. Jones*, 217 F.2d 239, 241-42 (7th Cir. 1954); *Williams v. Capital Transit Co.*, 215 F.2d 487, 490 (D.C. Cir. 1954); *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 246 (3d Cir. 1951); *Jackson v. Heiser*, 111 F.2d 310, 312-13 (9th Cir. 1940); *Ziegler v. United States*, 86 F.R.D. 703, 707 (E.D. Pa. 1980); *Allen v. Jacobson*, 82 F.R.D. 355, 358 (N.D. Tex. 1979); *Gray v. Permanent Mission of People's Republic of the Congo to the U.N.*, 443 F. Supp. 816, 821-22 (S.D.N.Y.), *aff'd mem.*, 580 F.2d 1044 (2d Cir. 1978); *Thorne v. Pennsylvania*, 77 F.R.D. 396, 397-98 (E.D. Pa. 1977); *Rasmussen v. W.E. Hutton & Co.*, 68 F.R.D. 231, 235 (N.D. Ga. 1975); *H & F Barge Co. v. Garber Bros.*, 71 F.R.D. 5, 9 (E.D. La. 1974), *aff'd*, 534 F.2d 1103 (5th Cir. 1976) (per curiam); *Ameday v. United States Trucking Co.*, 62 F.R.D. 72, 73 (E.D. Pa. 1974); *Phillips v. Flynn*, 61 F.R.D. 574, 577-78 (E.D. Pa. 1974); *Schartner v. Copeland*, 59 F.R.D. 653, 656-57 (M.D. Pa.), *aff'd mem.*, 487 F.2d 1395 (3d Cir. 1973); *Henderson 66 Sales, Inc. v. Harvison*, 58 F.R.D. 408, 412 (N.D. Tex. 1973); *Heinert v. Johnson*, 319 F. Supp. 201, 203-04 (D.C.Z. 1970); *Horn v. Intelectron Corp.*, 294 F. Supp. 1153, 1154 (S.D.N.Y. 1968); *Byron v. Bleakley Transp. Co.*, 43 F.R.D. 413, 415-16 (S.D.N.Y. 1967); *Wagg v. Hall*, 42 F.R.D. 589, 591 (E.D. Pa. 1967); *United States v. \$3,976.62 in Currency*, 37 F.R.D. 564, 566 (S.D.N.Y. 1965); *Kadet-Kruger & Co. v. Celanese Corp. of Am.*, 216 F. Supp. 249, 250 (N.D. Ill. 1963); *Bruce v. Paxton*, 31 F.R.D. 197, 200-01 (E.D. Ark. 1962); *Morrissey v. Crabtree*, 143 F. Supp. 105, 106 (M.D.N.C. 1956); *Federal Enterprises, Inc. v. Frank Allbritten Motors, Inc.*, 16 F.R.D. 109, 113 (W.D. Mo. 1954); *United States v. Knox*, 79 F. Supp. 714, 715 (E.D. Tenn. 1948); *Huntington Cab Co. v. American Fidelity & Cas. Co.*, 4 F.R.D. 496, 499 (S.D.W. Va. 1945); *Bayley & Sons, Inc. v. Morgan*, 267 F. 858, 858-59 (E.D.N.Y. 1920).

84. *Contra*, cases cited note 37 *supra*.

85. Some courts have found the service to be valid but have nevertheless granted the set aside motion because the movant was found to lack knowledge of the suit due to innocent or excusably negligent conduct. *E.g.*, *Schwab v. Bullock's Inc.*, 508 F.2d 353, 355 (9th Cir. 1974); *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 246 (3d Cir. 1951); *Rasmussen v. W.E. Hutton & Co.*, 68 F.R.D. 231, 235 (N.D. Ga. 1975) (default); *Ameday v. United States Trucking Co.*, 62 F.R.D. 72, 73 (E.D. Pa. 1974); *Schartner v. Copeland*, 59 F.R.D. 653, 655-57 (M.D. Pa.), *aff'd mem.*, 487 F.2d 1395 (3d Cir. 1973); *Henderson 66 Sales, Inc. v. Harvison*, 58 F.R.D. 408, 411 (N.D. Tex. 1973); *Heinert v. Johnson*, 319 F. Supp. 201, 204-05 (D.C.Z. 1970); *Horn v. Intelectron Corp.*, 294 F. Supp. 1153, 1154-55 (S.D.N.Y. 1968); *Byron v. Bleakley Transp. Co.*, 43 F.R.D. 413, 415 (S.D.N.Y. 1967); *United States v. \$3,976.62 in Currency*, 37 F.R.D. 564, 566 (S.D.N.Y. 1965). In the following cases, the service was held to be valid and the motion was denied because the movant was found to have knowledge of the suit despite allegations to the contrary. *Smith v. Kincaid*, 249 F.2d 243, 245 (6th Cir. 1957); *Jones v. Jones*, 217 F.2d 239, 242 (7th

*Tozer v. Charles A. Krause Milling Co.*,<sup>86</sup> service of process was properly made upon the defendant foreign corporation through the Secretary of the Commonwealth of Pennsylvania. A copy of the process was forwarded to defendant's registered agent, but was returned undelivered.<sup>87</sup> In reversing the lower court's denial of the motion, the court excused the defendant's ignorance of the suit because "[d]efendant's only negligence was a careless conduct of its business in failing to ascertain that its broker had moved and in failing to notify the Secretary of the Commonwealth."<sup>88</sup>

## 2. The Movant's Negligence

In other cases, the movant may admit awareness of the suit, but claim that his negligence in allowing the default judgment to be entered was excusable.<sup>89</sup> Defendant corporations and insurance companies, for example, may attempt to rely on in-house or inter-office confusion to excuse delay in defending the suit.<sup>90</sup> Some courts, in

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Cir. 1954); *Jackson v. Heiser*, 111 F.2d 310, 312-13 (9th Cir. 1940); *Allen v. Jacobson*, 82 F.R.D. 355, 356-57 (N.D. Tex. 1979); *H & F Barge Co. v. Garber Bros.*, 71 F.R.D. 5, 9 (E.D. La. 1974), *aff'd*, 534 F.2d 1103 (5th Cir. 1976) (per curiam); *Wagg v. Hall*, 42 F.R.D. 589, 590 (E.D. Pa. 1967); *Necchi Sewing Mach. Sales Corp. v. Sewline Co.*, 194 F. Supp. 602, 604-05 (S.D.N.Y. 1960) (default); *Morrissey v. Crabtree*, 143 F. Supp. 105, 106 (M.D.N.C. 1956); *Federal Enterprises, Inc. v. Frank Allbritten Motors, Inc.*, 16 F.R.D. 109, 110-11 (W.D. Mo. 1954); *United States v. Knox*, 79 F. Supp. 714, 715 (E.D. Tenn. 1948). To ensure awareness of the suit, some courts have indicated that, whenever possible, the defendant should be personally served. *E.g.*, *Ameday v. United States Trucking Co.*, 62 F.R.D. 72, 73-74 (E.D. Pa. 1974); *Henderson 66 Sales, Inc. v. Harvison*, 58 F.R.D. 408, 411 (N.D. Tex. 1973); *Byron v. Bleakley Transp. Co.*, 43 F.R.D. 413, 415 (S.D.N.Y. 1967). At the very least, courts require strict compliance with the provisions of substitute service statutes. *E.g.*, *Heinert v. Johnson*, 319 F. Supp. 201, 204 (D.C.Z. 1970); *Kadet-Kruger & Co. v. Celanese Corp. of Am.*, 216 F. Supp. 249, 250 (N.D. Ill. 1963) (default).

86. 189 F.2d 242 (3d Cir. 1951).

87. *Id.* at 243-44.

88. *Id.* at 246.

89. *E.g.*, *Ralston Purina Co. v. Navieras de Canarias, S.A.*, 619 F.2d 152, 153 (1st Cir. 1980) (motion denied); *Trueblood v. Grayson Shops, Inc.*, 32 F.R.D. 190, 192 (E.D. Va. 1963) (motion granted).

90. For cases in which a corporate movant attempted to excuse its conduct in contributing to the delay, see *Baez v. S.S. Kresge Co.*, 518 F.2d 349, 350 (5th Cir. 1975) (per curiam) (motion denied), *cert. denied*, 425 U.S. 904 (1976); *Greenspun v. Bogan*, 492 F.2d 375, 382 (1st Cir. 1974) (same); *Insurance Co. of N. Am. v. S.S. Hellenic Patriot*, 87 F.R.D. 136, 138 (S.D.N.Y. 1980) (motion granted); *Reid v. Liberty Consumer Discount Co.*, 484 F. Supp. 435, 439 (E.D. Pa. 1980) (motion denied); *Wilcox v. Triple D Corp.*, 78 F.R.D. 5, 7-8 (E.D. Va. 1978) (default) (motion granted on condition that movant reimburse plaintiff for costs occasioned by the delay); *International Corporate Enterprises v. Toshoku Ltd.*, 71 F.R.D. 215, 217-18 (N.D. Tex. 1976) (same); *Usery v. Weiner Bros.*, 70 F.R.D. 615, 617 (D. Conn. 1976) (motion denied); *Rasmussen v. W.E. Hutton & Co.*, 68 F.R.D. 231, 235 (N.D.

refusing to excuse such conduct, insist that minimal internal safeguards should exist to ensure that legal documents reach the responsible party in time for him to avoid defaulting.<sup>91</sup> In granting the set aside motion, other courts have considered the diligence of the movant after discovering the error<sup>92</sup> and the actions of the opposing party.<sup>93</sup>

Other excuses for delay in defending are difficult to categorize. The success of excuses offered by movants, such as illness,<sup>94</sup> alternative commitments,<sup>95</sup> or confusion as to court procedures<sup>96</sup> or related cases,<sup>97</sup> will depend to some extent on the court's preference for a trial on the merits.<sup>98</sup> In some cases, the sophistication of the movant

Ga. 1975) (default) (motion granted); *Robinson v. Bantam Books, Inc.*, 49 F.R.D. 139, 141 (S.D.N.Y. 1970) (default) (motion denied); *Nelson v. Coleman Co.*, 41 F.R.D. 7, 9-10 (D.S.C. 1966) (default) (same). For cases in which a defending insurance company attempted to excuse its conduct in contributing to the delay, see *Davis v. Safeway Stores, Inc.*, 532 F.2d 489, 490 (5th Cir. 1976) (per curiam) (motion denied); *Greco v. Reynolds*, 416 F.2d 965, 965 (3d Cir. 1969) (per curiam) (same); *Tolson v. Hodge*, 411 F.2d 123, 129 (4th Cir. 1969) (motion granted); *Spica v. Garczynski*, 78 F.R.D. 134, 135 (E.D. Pa. 1978) (default) (motion denied); *Medunic v. Lederer*, 65 F.R.D. 403, 405-07 (E.D. Pa. 1974) (default) (same), *rev'd*, 533 F.2d 891 (3d Cir. 1976); *Trueblood v. Grayson Shops, Inc.*, 32 F.R.D. 190, 193 (E.D. Va. 1963) (motion granted); *Stuski v. United States Lines*, 31 F.R.D. 188, 190-91 (E.D. Pa. 1962) (default) (same).

91. *Davis v. Safeway Stores, Inc.*, 532 F.2d 489, 490 (5th Cir. 1976) (per curiam); *Baez v. S.S. Kresge Co.*, 518 F.2d 349, 350 (5th Cir. 1975) (per curiam), *cert. denied*, 425 U.S. 904 (1976); *International Corporate Enterprises v. Toshoku Ltd.*, 71 F.R.D. 215, 218 (N.D. Tex. 1976).

92. *Tolson v. Hodge*, 411 F.2d 123, 129-30 (4th Cir. 1969); *Trueblood v. Grayson Shops, Inc.*, 32 F.R.D. 190, 197 (E.D. Va. 1963).

93. *Insurance Co. of N. Am. v. S.S. Hellenic Patriot*, 87 F.R.D. 136, 138-39 (S.D.N.Y. 1980); *Stuski v. United States Lines*, 31 F.R.D. 188, 191 (E.D. Pa. 1962) (default).

94. *Rooks v. American Brass Co.*, 263 F.2d 166, 167 (6th Cir. 1959) (per curiam); *Aberson v. Glassman*, 70 F.R.D. 683, 684 (S.D.N.Y. 1976) (default).

95. *Morris v. Charnin*, 85 F.R.D. 689, 690 (S.D.N.Y. 1980) (movant alleged delay due to "extreme work-related pressure;" motion granted); *Usery v. Weiner Bros.*, 70 F.R.D. 615, 617 (D. Conn. 1976) (movant alleged delay due to business commitments; motion denied); *Bowles v. Branick*, 66 F. Supp. 557, 558-59 (W.D. Mo. 1946) (movant alleged delay due to attendance of sick father; motion denied).

96. *Collex, Inc. v. Walsh*, 69 F.R.D. 20, 23 (E.D. Pa. 1975); *Titus v. Smith*, 51 F.R.D. 224, 226-27 (E.D. Pa. 1970) (default); *Standard Grate Bar Co. v. Defense Plant Corp.*, 3 F.R.D. 371, 371-72 (M.D. Pa. 1944).

97. *Allen v. Jacobson*, 82 F.R.D. 355, 357 (N.D. Tex. 1979); *United States v. 96 Cases, More or Less, of Fireworks*, 244 F. Supp. 272, 272 (N.D. Ohio 1965).

98. *Compare United States v. 96 Cases, More or Less, of Fireworks*, 244 F. Supp. 272, 273 (N.D. Ohio 1965) ("to deny Movant the right to a full and fair trial of the issues . . . would be a rather harsh penalty for an error in judgment") and *Standard Grate Bar Co. v. Defense Plant Corp.*, 3 F.R.D. 371, 372 (M.D. Pa. 1944) ("[p]owers vested in the trial courts by Rule 60(b) should be liberally exercised in order that cases may be disposed of upon their merits") with *Allen v. Jacobson*, 82 F.R.D. 355, 358 (N.D. Tex. 1979) ("the desirability of orderliness and predictability in the judicial process speaks for caution in the reopening of judgments") and

has been a crucial factor,<sup>99</sup> especially when the movant is appearing *pro se*.<sup>100</sup>

### 3. Attorney Negligence

Courts have discussed attorney negligence<sup>101</sup> as the cause of the original entry of the default judgment in a number of the reported cases involving a motion to set aside a default judgment. In such cases, a court's consideration of the set aside motion is further complicated because it is the client who will be injured if the attorney's conduct is held to be inexcusable.<sup>102</sup> If the attorney demonstrates due diligence in his client's affairs and a good faith effort in complying with court procedures, a court may find the negligence excusable under rule 60(b)(1).<sup>103</sup> Such a demonstration includes a showing

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Aberson v. Glassman, 70 F.R.D. 683, 684 (S.D.N.Y. 1976) (default) ("schedule[s] must be established and adhered to if this busy court is to be expected to handle the growing number of disputes brought before it").

99. Morris v. Charnin, 85 F.R.D. 689, 690 (S.D.N.Y. 1980) (motion granted); United States v. Williams, 109 F. Supp. 456, 462 (W.D. Ark. 1952) (same); Fleming v. Mante, 10 F.R.D. 391, 392 (N.D. Ohio 1950) (same); Woods v. Severson, 9 F.R.D. 84, 87 (D. Neb. 1948) (same).

100. Transport Pool Div. of Container Leasing, Inc. v. Joe Jones Trucking Co., 319 F. Supp. 1308, 1310-11 (N.D. Ga. 1970); Kinnear Corp. v. Crawford Door Sales Co., 49 F.R.D. 3, 6 (D.S.C. 1970); Woods v. Severson, 9 F.R.D. 84, 87 (D. Neb. 1948). Professor Moore has argued that "when a litigant appears *pro se* . . . good reason may exist for relaxing to some extent the standard of alertness that might be supposed to apply to a member of the bar." 7 J. Moore, Federal Practice ¶ 60.27[2], at 364-65 (2d ed. 1976) (footnotes omitted). Twenty-one of 31 judges who responded to a question as to whether they would be more lenient in excusing the delay of a *pro se* defendant indicated that they would be. Two of those judges qualified their response by stating that the sophistication or wealth of the defendant would be a crucial factor. See note 8 *supra*.

101. For a general discussion of the relation of attorney negligence to rule 60(b), see Kane, *Relief from Federal Judgments: A Morass Unrelieved by a Rule*, 30 Hastings L.J. 41, 74-80 (1978).

102. *E.g.*, Blois v. Friday, 612 F.2d 938, 940 (5th Cir. 1980) (*per curiam*); Barber v. Turberville, 218 F.2d 34, 36 (D.C. Cir. 1954); United States v. Berger, 86 F.R.D. 713, 714 (W.D. Pa. 1980); Transport Pool Div. of Container Leasing, Inc. v. Joe Jones Trucking Co., 319 F. Supp. 1308, 1311 (N.D. Ga. 1970); Minneapolis Brewing Co. v. Merritt, 143 F. Supp. 146, 149 (D.N.D. 1956).

103. Blois v. Friday, 612 F.2d 938, 940 (5th Cir. 1980) (*per curiam*) (attorney error called "technical" or "slight"); Tolson v. Hodge, 411 F.2d 123, 129-30 (4th Cir. 1969) (delay held by court to be result of "necessity" rather than neglect); Edwin Raphael Co. v. Maharam Fabrics Corp., 283 F.2d 310, 311 (7th Cir. 1960) ("misunderstanding of counsel" held to be excusable neglect); General Tire & Rubber Co. v. Olympic Gardens, Inc., 85 F.R.D. 66, 70 (E.D. Pa. 1979) (delay due to attorney's out of state trip held excusable because attorney had contacted opposing counsel prior to trip); Kennerly v. Aro, Inc., 447 F. Supp. 1083, 1089 (E.D. Tenn. 1977) (default) (attorney's mistaken belief that he had filed an answer held excusable); Hamilton v. Edell, 67 F.R.D. 18, 21 (E.D. Pa. 1975) (default) (failure to file a timely answer due to office confusion held excusable); Moran v. Mitchell, 354 F. Supp. 86, 87 (E.D. Va.

that the attorney was reasonably prompt both in discovering that a default judgment had been entered and in moving to set it aside.<sup>104</sup>

The success of excuses such as excessive caseloads,<sup>105</sup> office confusion,<sup>106</sup> confusion with related cases,<sup>107</sup> personal problems,<sup>108</sup> or

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1973) (default) (attorney's mistake as to length of time he had to file an answer held excusable); *Nunn v. Reina*, 21 F.R.D. 573, 575 (E.D. Pa. 1958) (failure to file answer due to "attorney's honest mistake" held excusable); *Elias v. Pitucci*, 13 F.R.D. 13, 14 (E.D. Pa. 1952) (default) (attorney's mistake of law held excusable).

104. *A.F. Dormeyer Co. v. M.J. Sales & Distrib. Co.*, 461 F.2d 40, 43 (7th Cir. 1972); *Altschul v. Paine Webber, Inc.*, 488 F. Supp. 858, 859 (S.D.N.Y. 1980) (default); *General Tire & Rubber Co. v. Olympic Gardens, Inc.*, 85 F.R.D. 66, 70 (E.D. Pa. 1979); *Vega Matta v. Alvarez de Choudens*, 440 F. Supp. 246, 248 (D.P.R. 1977), *aff'd mem.*, 577 F.2d 722 (1st Cir. 1978) (default); *Brogie v. Mackay-Smith*, 75 F.R.D. 739, 742 (W.D. Va. 1977) (default); *Hamilton v. Edell*, 67 F.R.D. 18, 21 (E.D. Pa. 1975) (default); *Nunn v. Reina*, 21 F.R.D. 573, 575 (E.D. Pa. 1958) (default); *Elias v. Pitucci*, 13 F.R.D. 13, 14 (E.D. Pa. 1952) (default).

105. *Jackson v. Beech*, 636 F.2d 831, 833 (D.C. Cir. 1980) (motion granted); *Altschul v. Paine Webber, Inc.*, 488 F. Supp. 858, 859 (S.D.N.Y. 1980) (default) (motion granted); *General Tire & Rubber Co. v. Olympic Gardens, Inc.*, 85 F.R.D. 66, 70 (E.D. Pa. 1979) (motion granted); *Greene v. Pyatt*, 78 F.R.D. 362, 363 (E.D.N.Y. 1978) (motion denied); *A-Plus Answering Serv., Inc. v. Elmhurst Answering Exch., Inc.*, 74 F.R.D. 157, 158 (E.D.N.Y. 1977) (motion denied); *Vega Matta v. Alvarez de Choudens*, 440 F. Supp. 246, 249 (D.P.R. 1977) (default) (motion denied), *aff'd mem.*, 577 F.2d 722 (1st Cir. 1978); *Kostenbauder v. Secretary, HEW*, 71 F.R.D. 449, 451-52 (M.D. Pa. 1976) (attorney also claimed involvement with political campaign; motion denied); *aff'd mem. sub nom. Kostenbauder v. Weinberger*, 556 F.2d 567 (3d Cir. 1977), *Canup v. Mississippi Valley Barge Line Co.*, 31 F.R.D. 282, 284 (W.D. Pa. 1962) (default) (motion denied); *Ledwith v. Storkan*, 2 F.R.D. 539, 541-42 (D. Neb. 1942) (attorney's affidavit stated that he was out of the jurisdiction on other business and thus unaware that a default judgment had been entered; motion denied).

106. In *Blois v. Friday*, 612 F.2d 938 (5th Cir. 1980) (*per curiam*), the attorney did not receive the defendant's motion for summary judgment in time to defend because he had failed to inform the opposing party that he had relocated. The court held that his error was excusable and it set aside the summary judgment that had been taken by default. *Id.* at 940. In *Savarese v. Edrick Transfer & Storage, Inc.*, 513 F.2d 140 (9th Cir. 1975), confusion between defendant's Arizona and Washington attorneys was blamed for the delay as each assumed the other would file an answer. The court stated that if the excuse were true, the lower court may have been too harsh in denying the motion. The court noted, however, that "the record suggests that the real reason that no answer was filed was because of a lack of understanding of the removal process on the part of [defendant's] attorneys." *Id.* at 146. The court refused to set aside the default judgment. *Id.* at 147. In *Standard Newspapers, Inc. v. King*, 375 F.2d 115 (2d Cir. 1967) (*per curiam*), the court held that "misplacing papers in the excitement of moving an office" was a "frivolous" excuse, especially because the move occurred fourteen months after the action was begun. *Id.* at 116. The court refused to grant the set aside motion. *Id.* In *Barber v. Turberville*, 218 F.2d 34 (D.C. Cir. 1954), the attorney claimed that "through oversight an answer was not filed 'because the complaint became mixed with another file.'" *Id.* at 35. The court granted the set aside motion. *Id.* at 36. In *Caruso v. Drake Motor Lines, Inc.*, 78 F.R.D. 586 (E.D. Pa. 1978), the attorney claimed that his secretary filed the summons and complaint "without bringing it to his attention." *Id.* at 588. The court granted the set aside motion. *Id.* In *Hamilton v. Edell*, 67 F.R.D. 18 (E.D. Pa.



inability to communicate with other necessary parties before entry of the default judgment<sup>109</sup> will depend to some extent on the court's view of the good faith efforts of the attorney.<sup>110</sup> In some cases, the actions of the non-defaulting party have been a factor in the court's decision whether to grant the set aside motion.<sup>111</sup> Moreover, as in

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1975) (default), the attorney claimed that the office was in a "state of transformation" that resulted in "unsettling the office substantially." *Id.* at 21 (footnote omitted). The court granted the set aside motion. *Id.* In *Minneapolis Brewing Co. v. Merritt*, 143 F. Supp. 146 (D.N.D. 1956), the court held that the confusion resulting from the assumption by one attorney of the practice of another excused the attorney's neglect in filing a timely answer. *Id.* at 148-49.

107. In *Schram v. O'Connor*, 2 F.R.D. 192 (E.D. Mich. 1941), the court held that the movant's attorney was not negligent in concluding that the opposing party was pursuing its remedy in bankruptcy court and thus failing to defend in federal district court. *Id.* at 194.

108. *E.g.*, *Ben Sager Chems. Int'l, Inc. v. E. Targosz & Co.*, 560 F.2d 805, 811 (7th Cir. 1977) (attorney allegedly "preoccupied with personal problems", motion denied); *United States v. Berger*, 86 F.R.D. 713, 713-14 (W.D. Pa. 1980) (attorney's illness resulted in failure to file timely answer; motion granted). In *Canup v. Mississippi Valley Barge Line Co.*, 31 F.R.D. 282 (W.D. Pa. 1962) (default), the court commented that "[w]ith . . . regard to the practical realities of life, the Court . . . is ordinarily indulgent when counsel's disability is due to conflicting professional engagements or even to impelling personal reasons (such as vacation or hunting season, family events of joyful nature such as weddings or christenings, public or philanthropic service, bar association activities, and the like, as well as the more sombre occasions of illness or death)". *Id.* at 283.

109. *Tolson v. Hodge*, 411 F.2d 123, 129-30 (4th Cir. 1969); *Consolidated Masonry & Fireproofing, Inc. v. Wagman Constr. Corp.*, 383 F.2d 249, 250 (4th Cir. 1967).

110. For example, in *Aberson v. Glassman*, 70 F.R.D. 683 (S.D.N.Y. 1976) (default), the court held that "lack of diligence or . . . carelessness on the part of a party's attorney" was inexcusable. *Id.* at 684 (footnote omitted). In *Canup v. Mississippi Valley Barge Line Co.*, 31 F.R.D. 282 (W.D. Pa. 1962) (default), the court, noting that the law firm involved was a persistent offender and that its only excuse for the delay was inadvertence, stated that "[t]o neglect and ignore a date for action in a court proceeding is in reality a thinly-veiled species of disrespect or contempt for the Court". *Id.* at 283.

111. In *Hutton v. Fisher*, 359 F.2d 913 (3d Cir. 1966), the junior member of a plaintiff's law firm sought entry of a default despite discussions between a senior member of the firm and opposing counsel. The court granted the set aside motion because the default would have been avoided or quickly challenged if not for the failure of communication within the firm. *Id.* at 915; *accord*, *United States v. An Undetermined Quantity of an Article of Drug Labeled as Benylin Cough Syrup*, 583 F.2d 942, 948-50 (7th Cir. 1978) (per curiam) (court weighed misconduct of both parties and denied the motion); *Charlton L. Davis & Co. v. Fedder Data Center, Inc.*, 556 F.2d 308, 309 (5th Cir. 1977) (despite contact with defendant's attorney, plaintiff's attorney obtained a default judgment without notifying him; motion granted); *Consolidated Masonry & Fireproofing, Inc. v. Wagman Constr. Corp.*, 383 F.2d 249, 251 (4th Cir. 1967) (court refused to believe the movant's contention that he had been misled by the opposing party; motion denied).

other cases, the court may consider the merits of the movant's defense to the suit<sup>112</sup> and the potential prejudice to the other party.<sup>113</sup>

When the court is not convinced that the attorney's conduct is excusable, the effect on the client of denying the motion becomes more critical.<sup>114</sup> Yet, in *Link v. Wabash Railroad*,<sup>115</sup> the Supreme Court expressed little sympathy for the plight of the client.<sup>116</sup> Writing for the majority, Justice Harlan stated that

[t]here is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent.<sup>117</sup>

The Court added that a client so injured had an adequate remedy in a suit for malpractice.<sup>118</sup> It has been further suggested that "[i]f . . . counsel for defendants can neglect without excuse their clients' business but no ill effects to the clients will be permitted to

112. *A.F. Dormeyer Co. v. M.J. Sales & Distrib. Co.*, 461 F.2d 40, 43 (7th Cir. 1972); *Tolson v. Hodge*, 411 F.2d 123, 130 (4th Cir. 1969); *Consolidated Masonry & Fireproofing, Inc. v. Wagman Constr. Corp.*, 383 F.2d 249, 252 (4th Cir. 1967); *Hutton v. Fisher*, 359 F.2d 913, 916 (3d Cir. 1966); *General Tire & Rubber Co. v. Olympic Gardens, Inc.*, 85 F.R.D. 66, 69 (E.D. Pa. 1979); *SEC v. Vogel*, 49 F.R.D. 297, 299 (S.D.N.Y. 1969) (default); *Albert Levine Assocs. v. Kershner*, 45 F.R.D. 450, 451 (S.D.N.Y. 1968) (default).

113. *Blois v. Friday*, 612 F.2d 938, 940 (5th Cir. 1980) (per curiam); *Barber v. Turberville*, 218 F.2d 34, 36 (D.C. Cir. 1954); *General Tire & Rubber Co. v. Olympic Gardens, Inc.*, 85 F.R.D. 66, 70 (E.D. Pa. 1979); *SEC v. Vogel*, 49 F.R.D. 297, 299 (S.D.N.Y. 1969) (default); *Albert Levine Assocs. v. Kershner*, 45 F.R.D. 450, 451 (S.D.N.Y. 1968) (default).

114. See note 102 *supra*.

115. 370 U.S. 626 (1962).

116. *Id.* at 633-34.

117. *Id.* Mr. Justice Harlan added that "[a]ny other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent." *Id.* at 634. Judge Mulligan, in *United States v. Ciriame*, 535 F.2d 736 (2d Cir. 1976), *rev'd on other grounds*, 563 F.2d 26 (2d Cir. 1977), noted that the Second Circuit "has rather consistently refused to relieve a client of the burdens of a final judgment entered against him due to the mistake or omission of his attorney by reason of the latter's ignorance of the law or of the rules of the court, or his inability to efficiently manage his caseload." *Id.* at 739; *accord*, *Ben Sager Chems. Int'l, Inc. v. E. Targosz & Co.*, 560 F.2d 805, 809 (7th Cir. 1977) ("[n]either ignorance nor carelessness on the part of a litigant or his attorney provide grounds for relief under Rule 60(b)(1)").

118. 370 U.S. at 634 n.10; *accord*, *Ben Sager Chems. Int'l, Inc. v. E. Targosz & Co.*, 560 F.2d 805, 809 (7th Cir. 1977); *Barber v. Turberville*, 218 F.2d 34, 38 (D.C. Cir. 1954) (Prettyman, J., dissenting); *Cliff v. PPX Publishing Co.*, 84 F.R.D. 369, 371 (S.D.N.Y. 1979). One commentator has argued that rule 60(b) should be amended to shift any costs from the client to the attorney when the attorney's negligence caused the entry of the judgment. Kane, *supra* note 101, at 77-80.

result from this negligence, complete chaos in judicial proceedings will surely result."<sup>119</sup>

Other courts have indicated that innovative<sup>120</sup> or liberal<sup>121</sup> interpretations of the rule 60(b)(1) requirements would avoid injustice to the client that could result from a strict application of the *Link* doctrine. In *Barber v. Turberville*,<sup>122</sup> the court focused on the conduct of the client rather than that of the attorney.<sup>123</sup> In explaining its decision to grant the set aside motion, the court stated that when the defendant is not personally negligent, "the courts have been reluctant to attribute to the parties the errors of their legal representatives."<sup>124</sup>

Some courts have avoided determining whether the attorney's conduct constitutes "excusable neglect" under subdivision (1) by relieving the client of the default judgment under the "other reason" clause of subdivision (6).<sup>125</sup> Application of this subdivision, however, is complicated by the Supreme Court's decision in *Klapprott v. United States*.<sup>126</sup> In *Klapprott*, the Court held that rule 60(b)(6) relief can be granted only in an "extraordinary situation" that cannot be "classified as mere 'neglect'" under rule 60(b)(1).<sup>127</sup>

119. *Barber v. Turberville*, 218 F.2d 34, 38 (D.C. Cir. 1945) (Prettyman, J., dissenting); *accord*, *Canup v. Mississippi Valley Barge Line Co.*, 31 F.R.D. 282, 283 (W.D. Pa. 1962) (default); *Minneapolis Brewing Co. v. Merritt*, 143 F. Supp. 146, 149 (D.N.D. 1956).

120. In *Blois v. Friday*, 612 F.2d 938 (5th Cir. 1980) (per curiam), the court seemingly adopted a new standard when it stated that the movant "should not be punished for his attorney's mistake absent a clear record of delay, *willful contempt or contumacious conduct*." *Id.* at 940 (emphasis added) (citation omitted). In *United States v. Berger*, 86 F.R.D. 713 (W.D. Pa. 1980), the court granted the set aside motion despite the attorney's neglect because it did not reach the level of "*culpable conduct*." *Id.* at 715 (emphasis added); *accord*, *Caruso v. Drake Motor Lines, Inc.*, 78 F.R.D. 586, 588 (E.D. Pa. 1978).

121. In *Greenspun v. Bogan*, 492 F.2d 375 (1st Cir. 1974), the court argued that "liberal construction [of rule 60(b)(1)] is usually reserved for instances where error is due to failure of attorneys or other agents to act on behalf of their clients." *Id.* at 382.

122. 218 F.2d 34 (D.C. Cir. 1954).

123. *Id.* at 36.

124. *Id.*; *accord*, *Jackson v. Beech*, 636 F.2d 831, 837 (D.C. Cir. 1980); *A.F. Dormeyer Co. v. M.J. Sales & Distrib. Co.*, 461 F.2d 40, 42 (7th Cir. 1972); *United States v. Berger*, 86 F.R.D. 713, 714 (W.D. Pa. 1980); *Caruso v. Drake Motor Lines, Inc.*, 78 F.R.D. 586, 588 (E.D. Pa. 1978); *Brogie v. Mackay-Smith*, 75 F.R.D. 739, 742 (W.D. Va. 1977) (default); *Moran v. Mitchell*, 354 F. Supp. 86, 87 (E.D. Va. 1973) (default); *A.C. Samford, Inc. v. United States*, 226 F. Supp. 72, 76-77 (M.D. Ga. 1963) (default).

125. *United States v. Cirami*, 563 F.2d 26, 32 (2d Cir. 1977); *New York State Health Facilities Ass'n v. Carey*, 76 F.R.D. 128, 133 (S.D.N.Y. 1977); *Transport Pool Div. of Container Leasing, Inc. v. Joe Jones Trucking Co.*, 319 F. Supp. 1308, 1311 (N.D. Ga. 1970); *Williams v. Cal Indus., Int'l*, 2 Bankr. Rep. (West) 76, 83 (Bankr. D. Or. 1979).

126. 335 U.S. 601 (1949).

127. *Id.* at 613. The Supreme Court reaffirmed this interpretation in *Ackermann v. United States*, 340 U.S. 193, 197-99 (1950); *see note 153 infra*.

Courts have complied with the spirit of the *Klapprott* decision by granting relief only in those cases involving gross attorney negligence.<sup>128</sup> In *L.P. Stuart, Inc. v. Matthews*,<sup>129</sup> the court stated that "clause (6) is broad enough to permit relief when as in this case personal problems of counsel cause him grossly to neglect a diligent client's case and mislead the client."<sup>130</sup> Courts adopting the *Stuart* approach require the movant to furnish adequate proof that the attorney's gross negligence actually caused entry of the default judgment.<sup>131</sup>

The relative diligence of the client is a key component in both the *Barber* and the *Stuart* approaches for avoiding potentially unjust application of the *Link* doctrine.<sup>132</sup> Other courts, however, have refused to set aside default judgments that are entered due to attorney negligence with little or no consideration of either the effect on the client or his responsibility for causing the entry of the default judgment.<sup>133</sup> If the attorney committed an innocent mistake of law, however, the

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128. In *Williams v. Cal Indus., Int'l*, 2 Bankr. Rep. (West) 76 (Bankr. D. Or. 1979), the court noted that "the greater the negligence involved, or the more willful the conduct, the less 'excusable' it is. However, the more inexcusable it is, the greater the sympathy with the victim." *Id.* at 83; *accord*, *United States v. Ciriimi*, 563 F.2d 26, 32 (2d Cir. 1977); *New York State Health Facilities Ass'n v. Carey*, 76 F.R.D. 128, 133 (S.D.N.Y. 1977); *Transport Pool Div. of Container Leasing, Inc. v. Joe Jones Trucking Co.*, 319 F. Supp. 1308, 1311 (N.D. Ga. 1970). *But see* *Ben Sager Chems. Int'l, Inc. v. E. Targosz & Co.*, 560 F.2d 805 (7th Cir. 1977); *Kostenbauder v. Secretary, HEW*, 71 F.R.D. 449 (M.D. Pa. 1976), *aff'd mem. sub nom. Kostenbauder v. Weinberger*, 556 F.2d 567 (3d Cir. 1977). In both *Targosz* and *Kostenbauder*, the agency theory of *Link v. Wabash R.R.*, 370 U.S. 626 (1962), was cited to support a denial of the motion despite claims of gross attorney negligence. 560 F.2d at 810; 71 F.R.D. at 452-53.

129. 329 F.2d 234 (D.C. Cir.), *cert. denied*, 379 U.S. 824 (1964).

130. *Id.* at 235.

131. *Compare* *United States v. Ciriimi*, 535 F.2d 736, 739 (2d Cir. 1976) *with* *United States v. Ciriimi*, 563 F.2d 26, 35 (2d Cir. 1977). In the second disposition of *Ciriimi*, the court reversed itself after the movant presented adequate proof that his attorney was grossly negligent. *See* *Ben Sager Chems. Int'l, Inc. v. E. Targosz & Co.*, 560 F.2d 805, 811 (7th Cir. 1977); *Ferraro v. Arthur M. Rosenberg Co.*, 156 F.2d 212, 214 (2d Cir. 1946) (default); *Cliff v. PPX Publishing Co.*, 84 F.R.D. 369, 371 (S.D.N.Y. 1979). For a thorough discussion of the history of the *Ciriimi* case, see 24 N.Y.L.S. L. Rev. 529 (1978).

132. *L.P. Stuart, Inc. v. Matthews*, 329 F.2d 234, 235 (D.C. Cir.), *cert. denied*, 379 U.S. 824 (1964); *Barber v. Turberville*, 218 F.2d 34, 36 (D.C. Cir. 1954); *accord*, *Jackson v. Beech*, 636 F.2d 831, 836-37 (D.C. Cir. 1980); *United States v. Ciriimi*, 563 F.2d 26, 32 (2d Cir. 1977); *A.F. Dormeyer Co. v. M.J. Sales & Distrib. Co.*, 461 F.2d 40, 42 (7th Cir. 1972); *Williams v. Cal Indus., Int'l*, 2 Bankr. Rep. (West) 76, 83 (Bankr. D. Or. 1979). For cases in which the court refused to believe that the movant had been diligent, see *Ben Sager Chems. Int'l, Inc. v. E. Targosz & Co.*, 560 F.2d 805, 811 (7th Cir. 1977); *Cliff v. PPX Publishing Co.*, 84 F.R.D. 369, 371 (S.D.N.Y. 1979); *Aberson v. Glassman*, 70 F.R.D. 683, 684 (S.D.N.Y. 1976) (default).

133. *Standard Newspapers, Inc. v. King*, 375 F.2d 115 (2d Cir. 1967) (*per curiam*); *Nederlandsche Handel-Maatschappij, N.V. v. Jay Emm, Inc.*, 301 F.2d 114 (2d Cir. 1962); *Greene v. Pyatt*, 78 F.R.D. 362 (E.D.N.Y. 1978); *Kostenbauder v. Secretary*,

majority of courts have relieved the client from the default judgment.<sup>134</sup>

### B. Rule 60(b)(6)

Rule 60(b)(6), which provides that a judgment may be set aside for "any other reason justifying relief,"<sup>135</sup> is the subdivision under which most other set aside motions are decided. Unlike movants filing under subdivisions (1) through (3), movants filing under rule 60(b)(6) are not confined to a maximum one year time limit after entry of the judgment.<sup>136</sup> The only restriction is that they file within a reasonable time.<sup>137</sup>

In *Clapprott v. United States*,<sup>138</sup> this subdivision was interpreted by the Supreme Court as giving courts broad discretionary power "to

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HEW, 71 F.R.D. 449 (M.D. Pa. 1976), *aff'd mem. sub nom. Kostenbauder v. Weinberger*, 556 F.2d 567 (3d Cir. 1977); *Canup v. Mississippi Valley Barge Line Co.*, 31 F.R.D. 282 (W.D. Pa. 1962) (default). For example, when an attorney allows a default judgment to be entered in a deliberate though miscalculated tactical move, the courts have denied relief. *E.g.*, *United States v. An Undetermined Quantity of an Article of Drug Labeled as Benylin Cough Syrup*, 583 F.2d 942, 947 (7th Cir. 1978) (per curiam); *United States v. Erdoss*, 440 F.2d 1221, 1222-23 (2d Cir.), *cert. denied*, 404 U.S. 849 (1971); *Vega Matta v. Alvarez de Choudens*, 440 F. Supp. 246, 249 (D.P.R. 1977), *aff'd mem.*, 577 F.2d 722 (1st Cir. 1978) (default).

134. *E.g.*, *Savarese v. Edrick Transfer & Storage, Inc.*, 513 F.2d 140, 146-47 (9th Cir. 1975); *Patapoff v. Vollstedt's Inc.*, 267 F.2d 863, 865 (9th Cir. 1959); *Moran v. Mitchell*, 354 F. Supp. 86, 87 (E.D. Va. 1973) (default); *Albert Levine Assocs. v. Kershner*, 45 F.R.D. 450, 451 (S.D.N.Y. 1968) (default); *United States v. \$3,216.59 in United States Currency*, 41 F.R.D. 433, 435 (D.S.C. 1967); *A.C. Samford, Inc. v. United States*, 226 F. Supp. 72, 76 (M.D. Ga. 1963) (default); *Nunn v. Reina*, 21 F.R.D. 573, 575 (E.D. Pa. 1958) (default); *Elias v. Pitucci*, 13 F.R.D. 13, 14 (E.D. Pa. 1952) (default).

135. Fed. R. Civ. P. 60(b)(6).

136. Fed. R. Civ. P. 60(b). The pertinent part provides that "[t]he motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment . . . was entered or taken."

137. *Id.* One commentator has noted that "what is a reasonable time must be determined in light of all attendant circumstances." 7 J. Moore, *Federal Practice* ¶ 60.27[3], at 384 (2d ed. 1979). In some cases, the motion was not filed within one year, but was held to have been filed within a reasonable time. *E.g.*, *Menier v. United States*, 405 F.2d 245 (5th Cir. 1968); *United States v. Karahalas*, 205 F.2d 331 (2d Cir. 1953); *Byron v. Bleakley Transp. Co.*, 43 F.R.D. 413 (S.D.N.Y. 1967); *Marquette Corp. v. Priester*, 234 F. Supp. 799 (E.D.S.C. 1964); *United States v. Williams*, 109 F. Supp. 456 (W.D. Ark. 1952). In other cases, the motion was not filed within one year and was held not to have been filed within a reasonable time. *E.g.*, *Cliff v. PPX Publishing Co.*, 84 F.R.D. 369 (S.D.N.Y. 1979); *Allen v. Jacobson*, 82 F.R.D. 355 (N.D. Tex. 1979); *United States v. Martin*, 395 F. Supp. 954 (S.D.N.Y. 1975); *United States v. Manos*, 56 F.R.D. 655 (S.D. Ohio 1972); *Caputo v. Globe Indem. Co.*, 41 F.R.D. 239 (E.D. Pa. 1966); *Ruddies v. Auburn Spark Plug Co.*, 261 F. Supp. 648 (S.D.N.Y. 1966); *United States v. Willenbrock*, 152 F. Supp. 431 (E.D. Pa. 1957). In *Fleming v. Mante*, 10 F.R.D. 391 (N.D. Ohio 1950), the court stated that "it is never too late to set aside an unjust judgment." *Id.* at 392.

138. 335 U.S. 601, *modified on other grounds*, 336 U.S. 942 (1949).

vacate judgments whenever such action is appropriate to accomplish justice."<sup>139</sup> The *Klapprott* Court, however, narrowed the scope of this discretion somewhat by construing rule 60(b)(6) to provide only for the setting aside of judgments "for all reasons except the five particularly specified."<sup>140</sup> Judge Learned Hand, in *United States v. Karahalias*,<sup>141</sup> demonstrated the problem with this interpretation.<sup>142</sup> He stated that rule 60(b)(6) "if confined to situations not covered by the first three subsections, would be extremely meagre, even assuming that we could find any scope for it at all."<sup>143</sup> He thought it inconceivable that subdivisions (1) through (3), which contain most, if not all, the possible equitable grounds for relief, should be limited by the maximum one year time limit for filing the motion, while the "vestigial equities" contained in subdivision (6) are limited only by a "reasonable time."<sup>144</sup> Thus, he interpreted rule 60(b)(6) "as giving the court a discretionary dispensing power over the [time] limitation imposed by the Rule."<sup>145</sup> On rehearing, however, the *Karahalias* court retracted this theory due to its incompatibility with the *Klapprott* decision.<sup>146</sup> Consequently, the problem remains that a movant under rule 60(b) can escape the one year time limitation only if he brings his motion for relief under one of the "vestigial equities."

After *Klapprott*, courts have generally agreed that the movant must adequately prove<sup>147</sup> the existence of an "extraordinary situation"<sup>148</sup> to

139. *Id.* at 615; *accord*, *Menier v. United States*, 405 F.2d 245, 248 (5th Cir. 1968); *Bridoux v. Eastern Air Lines, Inc.*, 214 F.2d 207, 210 (D.C. Cir.), *cert. denied*, 348 U.S. 821 (1954); *Transport Pool Div. of Container Leasing, Inc. v. Joe Jones Trucking Co.*, 319 F. Supp. 1308, 1311 (N.D. Ga. 1970); *Marquette Corp. v. Priester*, 234 F. Supp. 799, 803 (E.D.S.C. 1964); *United States v. Williams*, 109 F. Supp. 456, 461 (W.D. Ark. 1952).

140. 335 U.S. at 614-15.

141. 205 F.2d 331 (2d Cir. 1953).

142. *Id.* at 333.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 334. Since *Karahalias*, the Second Circuit has been notable in adhering to the *Klapprott* holding that the grounds for relief under the various subdivisions are mutually exclusive. *United States v. Cirami*, 535 F.2d 736, 740 (2d Cir. 1976), *rev'd on other grounds*, 563 F.2d 26 (2d Cir. 1977); *United States v. Erdoss*, 440 F.2d 1221, 1223 (2d Cir.), *cert. denied*, 404 U.S. 849 (1971); *Cliff v. PPX Publishing Co.*, 84 F.R.D. 369, 370 (S.D.N.Y. 1979); *Byron v. Bleakley Transp. Co.*, 43 F.R.D. 413, 415 (S.D.N.Y. 1967). Other courts have also held that the various subdivisions are mutually exclusive. *Ben Sager Chems. Int'l, Inc. v. E. Targosz & Co.*, 560 F.2d 805, 810 n.3 (7th Cir. 1977) (citing *Bershad v. McDonough*, 469 F.2d 1333, 1336 n.3 (7th Cir. 1972)); *Allen v. Jacobson*, 82 F.R.D. 355, 357 (N.D. Tex. 1979); *Woods v. Severson*, 9 F.R.D. 84, 85 (D. Neb. 1948); *Williams v. Cal Indus., Int'l*, 2 Bankr. Rep. (West) 76, 84 (Bankr. D. Or. 1979).

147. *E.g.*, *Allen v. Jacobson*, 82 F.R.D. 355, 358 (N.D. Tex. 1979); *Cliff v. PPX Publishing Co.*, 84 F.R.D. 369, 371 (S.D.N.Y. 1979); *Williams v. Cal Indus., Int'l*, 2 Bankr. Rep. (West) 76, 84 (Bankr. D. Or. 1979); *see note 131 supra*.

148. *Klapprott v. United States*, 335 U.S. at 613; *e.g.*, *United States v. Cirami*, 535 F.2d 736, 738 (2d Cir. 1976), *rev'd on other grounds*, 563 F.2d 26 (2d Cir.

obtain relief from a default judgment under subdivision (6). The rationale for this requirement is that the movant should be required to show something other than mere neglect because he is afforded the opportunity to file a motion more than one year after the entry of the judgment.<sup>149</sup> *Klapprott* provides an example of what constitutes a sufficiently "extraordinary situation" to justify relief from a default judgment under subdivision (6).<sup>150</sup> The combination of the petitioner's alleged illness, lack of funds sufficient to hire a lawyer, incarceration throughout the period by federal authorities, and the result that the default judgment stripped him of his naturalized citizenship was held sufficient to qualify him for relief under subdivision (6) despite a five year delay in filing the motion.<sup>151</sup> Although the government argued that this delay was the result of "excusable neglect" under rule 60(b)(1) and that the one year time limit applicable to that subdivision barred consideration of the motion, the Court disagreed. It stated that the factual situation presented by the petitioner could not "fairly or logically be classified as 'mere neglect' on his part."<sup>152</sup>

In few other reported cases has the movant alleged a similar catalogue of such exceptional circumstances.<sup>153</sup> That relief under subdivi-

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1977); *Cliff v. PPX Publishing Co.*, 84 F.R.D. 369, 371 (S.D.N.Y. 1979); *Allen v. Jacobson*, 82 F.R.D. 355, 357 (N.D. Tex. 1979); *Kostenbauder v. Secretary, HEW*, 71 F.R.D. 449, 452 (M.D. Pa. 1976), *aff'd mem. sub nom. Kostenbauder v. Weinberger*, 556 F.2d 567 (3d Cir. 1977); *Ruddies v. Auburn Spark Plug Co.*, 261 F. Supp. 648, 658 (S.D.N.Y. 1966); *Williams v. Cal Indus., Int'l*, 2 Bankr. Rep. (West) 76, 84 (Bankr. D. Or. 1979). Courts granting the set aside motion often quote *Klapprott* for the proposition that subdivision (6) relief should be granted "to accomplish justice." See cases cited note 137 *supra*. For discussions illustrating the problems in applying the "extraordinary situation" standard for rule 60(b)(6) relief, see Kane, *supra* note 104, at 50-62; Comment, *Equitable Power of a Federal Court to Vacate a Final Judgment for "Any Other Reason Justifying Relief"—Rule 60(b)(6)*, 33 Mo. L. Rev. 427, 434-39 (1968); Note, *Federal Rule 60(b): Relief from Civil Judgments*, 61 Yale L.J. 76, 81-86 (1952) [hereinafter cited as *Relief from Civil Judgments*].

149. "[T]he maximum time limitation of one year that applies to clause (1), (2) and (3) would be meaningless, if after the year period had run the movant could be granted relief under clause (6) for reasons covered by clauses (1), (2) and (3)." 7 J. Moore, *Federal Practice* ¶ 60.27[1], at 343-44 (2d ed. 1979) (footnote omitted).

150. 335 U.S. at 613-15.

151. *Id.*

152. *Id.* at 613.

153. In *Ackermann v. United States*, 340 U.S. 193 (1950), the Supreme Court was again called upon to define the scope of subdivision (6). In *Ackermann*, the petitioners had been stripped of their certificates of naturalization after a trial on the merits. In denying relief, the Court distinguished *Klapprott*, stating that "[t]he comparison strikingly points up the difference between no choice and choice; imprisonment and freedom of action; no trial and trial; no counsel and counsel; no chance for negligence and inexcusable negligence." *Id.* at 202. In *Menier v. United States*, 405 F.2d 245 (5th Cir. 1968), the court justified subdivision (6) relief on the grounds that the movant's hopeless insolvency, the questionable tactics of the opposing party, and the unusual court delay resulting in prejudice to the movant constituted "far more than mere allegations of excusable neglect." *Id.* at 248.

sion (6) may nonetheless be appropriate is demonstrated by those cases in which subdivision (6) is used to relieve a client of a judgment entered against him due to the inexcusable negligence of his attorney.<sup>154</sup> It is also evident in cases in which subdivision (6) is used to relieve a party of a judgment considered voidable because of the party's failure to receive notice under rule 55(b)(2).<sup>155</sup> In addition, subdivision (6) relief has been granted when an innocent third party was harmed by the default judgment.<sup>156</sup>

While attempting to honor the principles of the *Klapprott* decision, however, courts have found ways to exercise their discretion even when no showing of such an extraordinary situation has been made. When the movant has been barred from applying under subdivision (1) due to the one year time limit, courts have granted relief under rule 60(b)(6) because the movant's conduct was excusable, and justice required relieving him from the judgment.<sup>157</sup> For example, after retracting its interpretation of the scope of subdivision (6), the *Karahalias* court nevertheless granted the set aside motion.<sup>158</sup>

In practice, the set aside motion is usually filed within one year of the entry of the judgment.<sup>159</sup> Consequently, it is rarely necessary to determine under what subdivision of rule 60(b) relief should be

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154. See notes 125-31 *supra* and accompanying text.

155. See notes 200-01 *infra* and accompanying text.

156. *E.g.*, *Diversified Utilities Sales, Inc. v. Monte Fusco Excavating Contracting Co.*, 71 F.R.D. 661, 663 (E.D. Pa. 1976); *Marquette Corp. v. Priester*, 234 F. Supp. 799, 802-03 (E.D.S.C. 1964).

157. *E.g.*, *Menier v. United States*, 405 F.2d 245, 248 (5th Cir. 1968); *Transport Pool Div. of Container Leasing, Inc. v. Joe Jones Trucking Co.*, 319 F. Supp. 1308, 1312 (N.D. Ga. 1970); *Byron v. Bleakley Transp. Co.*, 43 F.R.D. 413, 415 (S.D.N.Y. 1967); *Marquette Corp. v. Priester*, 234 F. Supp. 799, 803 (E.D.S.C. 1964); *United States v. Williams*, 109 F. Supp. 456, 461-62 (W.D. Ark. 1952); *Fleming v. Mante*, 10 F.R.D. 391, 392 (N.D. Ohio 1950). Courts have also barred the movant from applying under subdivision (1) because of the one year time limit, but have refused to grant relief under subdivision (6). *Cliff v. PPX Publishing Co.*, 84 F.R.D. 369 (S.D.N.Y. 1979); *Allen v. Jacobson*, 82 F.R.D. 355 (N.D. Tex. 1979); *United States v. Martin*, 395 F. Supp. 954 (S.D.N.Y. 1975); *United States v. Manos*, 56 F.R.D. 655 (S.D. Ohio 1972); *Ruddies v. Auburn Spark Plug Co.*, 261 F. Supp. 648 (S.D.N.Y. 1966); *Caputo v. Globe Indem. Co.*, 41 F.R.D. 239 (E.D. Pa. 1966); *United States v. Willenbrock*, 152 F. Supp. 431 (E.D. Pa. 1957).

158. *United States v. Karahalias*, 205 F.2d 331, 335 (2d Cir. 1953). This manipulation of terminology underscores the ability of courts to continue to exercise their discretion in granting subdivision (6) relief. It has been argued that "the [Supreme] Court's principle that 60(b)(6) and other clauses of 60(b) are mutually exclusive has not been adhered to in practice. Court interpretations of the excusable neglect provisions in 60(b)(1) have been so broad that when read together with 60(b)(2) through (5), apparently few fact situations remain to call 60(b)(6) into play." *Relief from Civil Judgments*, *supra* note 148, at 82-83 (footnote omitted).

159. According to our survey, approximately 90% of the reported cases involving motions to set aside a default judgment were decided under subdivision (1) or subdivision (4).



granted. As one commentator has noted, "[i]n many situations exact categorization is very difficult and, in the main, should be avoided except where the category is obvious or where exact choice is necessary to decision."<sup>160</sup>

### C. Appearance and Notice

Another method of obtaining relief from a default judgment is provided by rule 55(b). This rule bars the clerk from entering a default judgment against a party who has appeared in the action<sup>161</sup> and provides that an appearing party "shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application."<sup>162</sup> If an appearing party has failed to receive this notice and either the clerk erroneously entered the judgment under rule 55(b)(1)<sup>163</sup> or the court entered the judgment *ex parte* under rule 55(b)(2),<sup>164</sup> the party can attempt to establish such failure as a basis upon which the default judgment may be set aside. To succeed, he must first show that he has appeared, for a party who has failed to appear is not entitled to notice.<sup>165</sup> The rationale is that the entry of a default judgment is proper against a totally non-responsive party<sup>166</sup> to avoid undue delay to the plaintiff in obtaining relief<sup>167</sup> and to the court in disposing of the suit.<sup>168</sup> The entry of a default judgment

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160. 7 J. Moore, *Federal Practice* ¶ 60.27[1], at 346-47 (2d ed. 1979) (footnote omitted).

161. Fed. R. Civ. P. 55(b).

162. *Id.* 55(b)(2).

163. *Id.* 55(b)(1).

164. *Id.* 55(b)(2).

165. Fed. R. Civ. P. 5(a) delineates when service and filing of pleadings and other papers, including written notice, are required. The rule specifically states that "[n]o service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4." *Id.* 5(a); *e.g.*, *Baez v. S.S. Kresge Co.*, 518 F.2d 349, 350 (5th Cir. 1975) (*per curiam*), *cert. denied*, 425 U.S. 904 (1976); *Gomes v. Williams*, 420 F.2d 1364, 1367 (10th Cir. 1970); *Anderson v. Taylorcraft, Inc.*, 197 F. Supp. 872, 873 (W.D. Pa. 1961); *Barber v. Turberville*, 218 F.2d 34, 38-39 (D.C. Cir. 1954) (Prettyman, J., dissenting). *See also* *Central Operating Co. v. Utility Workers of Am.*, 491 F.2d 245, 252 (4th Cir. 1974) (under rules 5(a) and 77(d) parties who had not appeared not entitled to notice of court order enlarging the time for answering).

166. *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970) (*per curiam*) (default judgment normally available only when an essentially unresponsive party halts the adversary process).

167. *Id.* (when one party is unresponsive, "the diligent party must be protected lest he be faced with interminable delay and continued uncertainty as to his rights").

168. *Wilson v. Moore and Assocs.*, 564 F.2d 366, 369 n.4 (9th Cir. 1977) (default judgment against non-appearing party upheld when "[t]he adversary process was disrupted because the appellant, in the face of explicit warnings to file an answer, refused to be responsive, as orderly judicial procedures should, and do, require"). In limiting the notice requirement to parties who have appeared, rule 55(b)(2) serves

against a party who has failed to appear, either formally or informally, does not violate due process because by receiving notice of the suit through service of the summons and complaint the party is not without knowledge of the pendency of the suit.<sup>169</sup> In the face of this knowledge, total failure to appear is inexcusable, and a claim of lack of notice affords no basis for relief from the default judgment.<sup>170</sup>

### 1. What Constitutes an Appearance

The threshold issue raised by the notice requirement of rule 55(b)(2) is what constitutes an appearance. Courts have responded to this issue with varying degrees of liberality.<sup>171</sup> The filing of an answer or complaint has uniformly been held to constitute an appearance.<sup>172</sup> In the absence of the filing of a pleading relating to

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the goal of judicial economy, for it allows the court to proceed summarily against totally non-responsive parties and bars such parties from reopening judgments rendered against them on lack of notice grounds. See note 41 *supra* and accompanying text.

169. The court noted in *Central Operating Co. v. Utility Workers of Am.*, 491 F.2d 245 (4th Cir. 1974) that "[d]efault judgments entered for failure, after proper service, to answer within the time allowed do not violate due process." *Id.* at 251. If a party has not been validly served with the summons and complaint, however, the judgment is void as a matter of law, and the issues of appearance and notice need not be reached. See note 37 *supra* and accompanying text.

170. *E.g.*, *Wilson v. Moore and Assocs.*, 564 F.2d 366 (9th Cir. 1977); *Baez v. S.S. Kresge Co.*, 518 F.2d 349 (5th Cir. 1975) (*per curiam*), *cert. denied*, 425 U.S. 904 (1976); *Central Operating Co. v. Utility Workers of Am.*, 491 F.2d 245 (4th Cir. 1974); *Wokan v. Alladin Int'l, Inc.*, 485 F.2d 1232 (3d Cir. 1973); *Port-Wide Container Co. v. Interstate Maintenance Corp.*, 440 F.2d 1195 (3d Cir. 1971) (*per curiam*); *Gomes v. Williams*, 420 F.2d 1364 (10th Cir. 1970); *Rutland Transit Co. v. Chicago Tunnel Terminal Co.*, 233 F.2d 655 (7th Cir. 1956); *Sayers v. Colon*, 73 F.R.D. 77 (D.V.I. 1976); *Anderson v. Taylorcraft, Inc.*, 197 F. Supp. 872 (W.D. Pa. 1961); *United States v. Knox*, 79 F. Supp. 714 (E.D. Tenn. 1948).

171. In response to the question, "Do you consider a letter from the defaulting party to the plaintiff indicating an intention to defend the suit sufficient to constitute an appearance or is a formal court appearance necessary," 14 judges wrote that they would require a formal court appearance. Twelve judges indicated that such a letter would be sufficient to constitute an appearance. One judge wrote that the filing of a pleading is necessary. Two indicated that some filing with the court is needed, although not necessarily a formal filing of an appearance. One judge indicated that the letter would be sufficient if a *pro se* defaulter was involved, while another judge felt the letter would be sufficient unless the party in default was a corporation. Those judges who did not require a formal filing of an appearance indicated that they would consider many other types of communication sufficient to constitute an appearance. Five judges indicated that almost any communication between the parties or between the defaulting party and the court is sufficient. Some judges indicated that telephone calls and oral communications would suffice, while others indicated that some sort of a writing is required. See note 8 *supra*.

172. 10 C. Wright & A. Miller, *supra* note 10, § 2686, at 270-72; Annot., 27 A.L.R. Fed. 620 (1976); *e.g.*, *Magette v. Daily Post*, 535 F.2d 856, 856 (3d Cir. 1976) (*per curiam*) (answer); *Wilver v. Fisher*, 387 F.2d 66, 68 (10th Cir. 1967)

the cause of action, some courts require a formal filing of a notice of appearance pursuant to rule 79.<sup>173</sup> Courts have also found that less formal acts clearly indicating a movant's intention to defend or seek affirmative relief are sufficient to constitute an appearance.<sup>174</sup>

Contacts with the court that have been found sufficient to constitute an appearance for rule 55(b)(2) purposes include the filing of stipulations,<sup>175</sup> motions,<sup>176</sup> and a cost and claim bond.<sup>177</sup> In one case, the movant's presence at two pre-trial conferences was a factor in-

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(same); *Bass v. Hoagland*, 172 F.2d 205, 207 (5th Cir.) (answer sufficient even when movant's attorney subsequently withdrew his appearance), *cert. denied*, 338 U.S. 816 (1949); *Zaro v. Strauss*, 167 F.2d 218, 219 (5th Cir. 1948) (answer to original complaint sufficient even though movant failed to answer amended complaint); *Commercial Cas. Ins. Co. v. White Line Transfer & Storage Co.*, 114 F.2d 946, 947 (8th Cir. 1940) (per curiam) (complaint); *Sonus Corp. v. Matsushita Elec. Indus. Co.*, 61 F.R.D. 644, 646 (D. Mass. 1974) (same).

173. Fed. R. Civ. P. 79(a). Rule 79(a) provides in part that "[a]ll papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number." In none of the reported cases in this area did a court expressly state that it requires a formal filing pursuant to this rule, but perhaps this can be inferred from opinions in which less formal contacts were deemed not to constitute appearances. That some courts do require formal filings pursuant to this rule is clear from the response to our questionnaire. See note 171 *supra*.

174. 6 J. Moore, Federal Practice ¶ 55.05[3], at 55-55 (2d ed. 1976); e.g., *Charlton L. Davis & Co. v. Fedder Data Center, Inc.*, 556 F.2d 308, 309 (5th Cir. 1977); *Wilson v. Moore and Assocs.*, 564 F.2d 366, 369 (9th Cir. 1977); *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Leopfe*, 432 F.2d 689, 691-92 (D.C. Cir. 1970) (per curiam); *United States v. One 1966 Chevrolet Pickup Truck*, 56 F.R.D. 459, 461 (E.D. Tex. 1972); *Press v. Forest Labs., Inc.*, 45 F.R.D. 354, 357 (S.D.N.Y. 1968); *Anderson v. Taylorcraft, Inc.*, 197 F. Supp. 872, 874 (W.D. Pa. 1961); *Ken-Mar Airpark Inc. v. Toth Aircraft & Accessories Co.*, 12 F.R.D. 399, 400 (W.D. Mo. 1952).

175. E.g., *United States v. Melichar*, 56 F.R.D. 49, 50 (E.D. Wis. 1972) (formal stipulation extending time in which to answer held to constitute an appearance); *United States v. Manos*, 56 F.R.D. 655, 657-58 (S.D. Ohio 1972) (stipulation providing defendants an extension of time in which to plead or otherwise move to the complaint assumed, for sake of argument, to constitute an appearance); *United States v. Miller*, 9 F.R.D. 506, 508 (M.D. Pa. 1949) (stipulation submitting to the court's jurisdiction, admitting to the allegations of some counts of plaintiff's complaint, and consenting to an injunction held to constitute an appearance). The court in *Miller* opined that it could "see no magic in the mere filing of a praecipe for appearance" by the defaulting party. *Id.*

176. *Hoffman v. New Jersey Fed'n of Young Men's and Young Women's Hebrew Ass'ns.*, 106 F.2d 204, 205 (3d Cir. 1939) (filing of motion to dismiss for want of jurisdiction held to constitute an appearance). *But cf.* *Sayers v. Colon*, 73 F.R.D. 77, 78 (D.V.I. 1976) (motion to compel non-resident plaintiffs to post security for costs held not to constitute an appearance for it in no way indicated an intention to defend the suit).

177. *United States v. One 1966 Chevrolet Pickup Truck*, 56 F.R.D. 459 (E.D. Tex. 1972).

fluencing the court to find that an appearance had been made.<sup>178</sup> One court<sup>179</sup> concluded that "any action on the part of [the movant], except to object to the jurisdiction over his person which recognizes the case as in court, will constitute a general appearance."<sup>180</sup> That court, however, found that a change of address letter sent by the movant to the clerk did not constitute an appearance because it was not responsive to the complainant's suit and did not indicate the party's intent to defend.<sup>181</sup>

In addition to contacts with the court, various types of contact between the movant and the opposing party or between their attorneys have been found sufficient to constitute appearances. The rationale for allowing these less formal appearances is that the notice requirement of rule 55(b)(2) is "intended to protect those parties who, although delaying in a formal sense by failing to file pleadings within the twenty-day period, have otherwise indicated to the moving party a clear purpose to defend the suit."<sup>182</sup> Contacts between the parties that have been deemed sufficient to constitute appearances have included written and oral attempts at settlement negotiations,<sup>183</sup> com-

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178. *Collex, Inc. v. Walsh*, 74 F.R.D. 443, 446 (E.D. Pa. 1977). *Contra*, *United States v. Knox*, 79 F. Supp. 714, 715 (E.D. Tenn. 1948) (appearance not found although attorney who had represented movant in criminal case appeared at pre-trial conference and "from time to time in the civil matter").

179. *Anderson v. Taylorcraft, Inc.*, 197 F. Supp. 872 (W.D. Pa. 1961).

180. *Id.* at 874.

181. *Id.*

182. *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970) (per curiam); *accord*, *Collex, Inc. v. Walsh*, 74 F.R.D. 443, 446 (E.D. Pa. 1977); *United States v. Manos*, 56 F.R.D. 655, 659 (S.D. Ohio 1972) (quoting *Livermore*); *United States v. One 1966 Chevrolet Pickup Truck*, 56 F.R.D. 459, 461-62 (E.D. Tex. 1972) (quoting *Livermore*). One court has held, however, that the mere fact that the plaintiff knew that the defendant planned to contest the suit was insufficient to constitute an appearance, absent some contact that is "responsive to plaintiff's formal Court action." *Baez v. S.S. Kresge Co.*, 518 F.2d 349, 350 (5th Cir. 1975) (per curiam), *cert. denied*, 425 U.S. 904 (1976).

183. *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689 (D.C. Cir. 1970) (per curiam). In *Livermore*, the court found that failure to plead or file an appearance could not be interpreted as reluctance to defend the suit when the parties had written letters and had a phone conversation about arranging a meeting to settle this patent infringement suit. *Id.* at 692. Letters from the non-moving party's counsel to his client indicated that the non-moving party was aware that the movant would contest the suit if the settlement negotiations failed. In one letter, counsel wrote that "I avoided the subject, because I did not want to stimulate them into activity." *Id.* at 690 (emphasis omitted). In another letter counsel wrote that movant's counsel had remarked to him that "we would have difficulty in getting a judgment, indicating he is aware of the suit." *Id.* at 691. On the basis of this evidence, the court held that the movant had appeared and was thereby entitled to notice. Accordingly, it reversed the trial court's order denying the motion to set aside the default judgment. *Id.* at 692. In *Port-Wide Container Co. v. Interstate Maintenance Corp.*, 440 F.2d 1195 (3d Cir. 1971) (per curiam), the court summarily decided that participation in oral and written settlement negotiations over a period of

munications relating to extensions of time in which to answer,<sup>184</sup> appearances in closely related suits,<sup>185</sup> and letters to the other party

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several months after the filing of the complaint did not constitute an appearance. *Id.* at 1196. The court affirmed the trial court's denial of a motion to set aside a default judgment that had been entered by the clerk under rule 55(b)(1) notwithstanding that the movant's counsel never received a letter from the opposing party in which it was indicated that a default would be sought if settlement negotiations proved unsuccessful. The court's lack of sympathy for the movant is partially explainable in that the letter was hand-delivered to a secretary in the movant's office. Unfortunately, the secretary, who was fired at the end of the same day, never delivered the letter to her employer. *Id.*

184. *E.g.*, *Charlton L. Davis & Co. v. Fedder Data Center, Inc.*, 556 F.2d 308 (5th Cir. 1977). In *Charlton*, no answer was filed due to a misunderstanding as to which of the two defendants was to obtain counsel. Upon discovering this error, the movant's attorney both telephoned and wrote to the plaintiff's attorney, indicating his client's intention to defend and requesting additional time in which to answer. Plaintiff's attorney said he would consult his client, but instead obtained a default judgment six days later without giving any notice to the movant. In finding an appearance and granting the motion to vacate, the court stated that seeking "to reap tactical advantage from [the movant's] prior neglect by acquiring in stealth a decision sheltered by the rules which protect final judgments" was the type of practice rule 55 was designed to prevent. *Id.* at 309. In *Hutton v. Fisher*, 359 F.2d 913 (3d Cir. 1966), the movant's counsel failed to answer or take any steps in the litigation for nearly three years. *Id.* at 915. Although deciding that this conduct was grossly negligent, the court granted the set aside motion because the movant failed to receive rule 55(b)(2) notice. The court found that the agreement by a senior partner in the plaintiff's law firm to the movant's counsel's request for more time to answer constituted an appearance. The subsequent obtaining of a default by a junior partner in the firm who was unaware of the agreement was sufficient to justify setting aside the default judgment. *Id.* In *Rutland Transit Co. v. Chicago Tunnel Terminal Co.*, 233 F.2d 655 (7th Cir. 1956), although counsel for the parties repeatedly agreed that the plaintiff would not seek a default judgment, the court found that no appearance had been made. *Id.* at 657-58. *Rutland* is distinguishable from *Charlton* and *Hutton*. In the latter cases, the intent to defend was clear. In *Rutland*, however, the movant's attorney not only admitted to having no defense to the action, but, to obtain one of the time extensions, had given assurances to the plaintiff that he would interpose no defense. *Id.* at 657. A formal court order under rule 6(b) can extend the 20 day time limit in which to answer. Fed. R. Civ. P. 6(b). It is advisable to pursue this course of action rather than to rely on the representations of opposing counsel that they will not seek judgment by default. Such private agreements are not binding on the court. Enlargement of time under rule 6(b) is committed to the court's discretion, not the whim of the parties. *Id.*; *e.g.*, *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 130 F.2d 185, 187 (3d Cir. 1942) (court approval is required to make stipulations effective). Instructively, in *Rutland*, the court entered a default judgment even though the parties had privately agreed to extend the time for answering. 233 F.2d at 657.

185. *E.g.*, *Turner v. Salvatierra*, 580 F.2d 199, 201 (5th Cir. 1978) (*per curiam*) (answer and affirmative defenses filed and depositions taken in connection with plaintiff's original complaint constituted appearance for purposes of second complaint that was identical to the first); *Collex, Inc. v. Walsh*, 74 F.R.D. 443, 446 (E.D. Pa. 1977) (institution of suit in state court by movant involving same contract and issues as federal suit constituted unequivocal notice of intention to defend); *Press v. Forest Labs., Inc.*, 45 F.R.D. 354, 356-57 (S.D.N.Y. 1968) (formal appearances filed in state

containing an answer.<sup>186</sup> Because such contacts clearly indicate an intent to defend the suit, courts have held that the complainant must notify the opposing party of his application for a default judgment.<sup>187</sup>

## 2. Effect of Failure to Notify a Party Who Has Appeared

Although rule 55(b)(2) provides that notice of the application for a default judgment "shall" be served on a party who has appeared,<sup>188</sup> it does not specify the consequences of a party's failure to receive such notice. The courts' treatment of the effect of failure to give notice has varied greatly. Specifically, courts are divided on the issue whether failure to give notice should be necessarily regarded as a due process violation rendering the judgment void and amenable to being set aside under rule 60(b)(4).<sup>189</sup>

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action and original federal action that was "really one and the same" as the present action sufficient). In *Gomes v. Williams*, 420 F.2d 1364 (10th Cir. 1970), as in *Press*, an appearance was filed in a related state suit. The *Gomes* court, however, distinguished the cases, finding that, unlike the situation in *Press*, it was not at all clear to plaintiff Williams that the movant's attorney in the state suit would represent him in the federal suit. *Id.* at 1367-68; *accord*, *United States v. Knox*, 79 F. Supp. 714, 715 (E.D. Tenn. 1948) (appearance by attorney in related criminal case held insufficient).

186. *A.F. Dormeyer Co. v. M.J. Sales & Distrib. Co.*, 461 F.2d 40, 42 (7th Cir. 1972) (attorney's letter); *Dalminter, Inc. v. Jessie Edwards, Inc.*, 27 F.R.D. 491, 492-93 (S.D. Tex. 1961) (layman's letter). The court in *Dormeyer* refused to distinguish the case from *Dalminter* merely because that case had involved a layman's letter. *Id.* at 42-43. *Contra*, *Winfield Assocs. v. Stonecipher*, 429 F.2d 1087 (10th Cir. 1970) (affirming trial court, which had held that sending answer, counterclaim, stipulation for an extension of time, and notice for leave to appear specially to the plaintiff was not sufficient to constitute an appearance). In *Stonecipher*, the parties had also orally agreed on an extension of time in which to answer and had agreed that the plaintiff would file the papers forwarded by the movant's attorney. *Id.* at 1089. When the court refused to accept the filings, the plaintiff's attorney wrote to the movant to inform him of the possibility of a default judgment, but failed to warn him that the case was set for a report on status in three days. *Id.* Eight days after sending the letter, the plaintiff's counsel filed for a default judgment. He did not inform the movant of this or of the setting of dates for hearing on his application. The appellate court found no abuse of discretion in the finding of the trial court on this issue, but assumed that an appearance had been made and proceeded to affirm the lower court's denial. *Id.* at 1091; *see* note 214 *infra* and accompanying text.

187. *E.g.*, *Commercial Cas. Ins. Co. v. White Line Transfer & Storage Co.*, 114 F.2d 946, 947 (8th Cir. 1940) (*per curiam*); *Dalminter, Inc. v. Jessie Edwards, Inc.*, 27 F.R.D. 491, 493 (S.D. Tex. 1961).

188. Fed. R. Civ. P. 55(b)(2).

189. *Id.* 60(b)(4). *Sonus Corp. v. Matsushita Elec. Indus. Co.*, 61 F.R.D. 644 (D. Mass. 1974), was the only case found in which a court expressly referred to subdivision (4), the applicable subdivision of the rule. *Id.* at 647 n.4. The language that courts have used in finding a default judgment to be void for lack of rule 55(b)(2) notice has varied in its explicitness. *E.g.*, *Magette v. Daily Post*, 535 F.2d 856, 857 (3d Cir. 1976) (*per curiam*) ("judgment must be vacated"); *H.F. Livermore Corp. v. Aktiengesellschaft Gebrüder Loepfe*, 432 F.2d 689, 692 (D.C. Cir. 1970) (*per curiam*).

The view that failure to give the notice required by rule 55(b)(2) renders a judgment void as a matter of law largely prevailed until the 1970s.<sup>190</sup> The trend of the more recent decisions, however, is that failure to receive rule 55(b)(2) notice merely renders the judgment voidable by the court.<sup>191</sup> Professor Moore, a proponent of this view, argues that although failure to give notice is "a serious procedural irregularity . . . the error should be considered in the light of sur-

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(movant entitled to notice; "District Court erred"); *Wilver v. Fisher*, 387 F.2d 66, 69 (10th Cir. 1967) ("requires that it be set aside"); *Swallow v. United States*, 380 F.2d 710, 712 (10th Cir. 1967) ("due process of law requires more"); *Bass v. Hoagland*, 172 F.2d 205, 210-11 (5th Cir.) (void and denial of due process), *cert. denied*, 338 U.S. 816 (1949); *Zaro v. Strauss*, 167 F.2d 218, 221 (5th Cir. 1948) ("court had no power"); *Commercial Cas. Ins. Co. v. White Line Transfer & Storage Co.*, 114 F.2d 946, 947 (8th Cir. 1940) ("error necessitating reversal"); *Hoffman v. New Jersey Fed'n of Young Men's and Young Women's Hebrew Ass'ns*, 106 F.2d 204, 207 (3d Cir. 1939) ("the default judgment was . . . improper"); *United States v. One 1966 Chevrolet Pickup Truck*, 56 F.R.D. 459, 462 (E.D. Tex. 1972) (movant entitled "to the required three-day notice"); *United States v. Melichar*, 56 F.R.D. 49, 50 (E.D. Wis. 1972) ("must be set aside"); *Press v. Forest Labs., Inc.*, 45 F.R.D. 354, 357 (S.D.N.Y. 1968) ("must be vacated as a matter of law"); *United States v. Edgewater Dyeing and Finishing Co.*, 21 F.R.D. 304, 305 (E.D. Pa. 1957) ("motion to vacate the judgment must be granted"); *Ken-Mar Airpark Inc. v. Toth Aircraft & Accessories Co.*, 12 F.R.D. 399, 400 (W.D. Mo. 1952) ("failure of due process and the judgment was a nullity"); *United States v. Miller*, 9 F.R.D. 506, 509 (M.D. Pa. 1949) ("[c]lerk was without power to enter the judgment"). When this view of the failure to receive rule 55(b)(2) notice is taken, the critical issue is whether the movant has appeared. *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970) (per curiam) ("critical question"); *United States v. One 1966 Chevrolet Pickup Truck*, 56 F.R.D. 459, 461 (E.D. Tex. 1972) ("the issue"). If he has appeared, additional factors such as the presence of a meritorious defense, lack of prejudice, and reasons for the delay need not be considered. In *Wilver v. Fisher*, 387 F.2d 66 (10th Cir. 1967), the court, noting that the lower court had denied the motion because the movant had failed to show a meritorious defense, argued that "[t]he question is not whether a meritorious defense existed but whether the default [judgment] was properly entered." *Id.* at 69. The court in *Commercial Cas. Ins. Co. v. White Line Transfer & Storage Co.*, 114 F.2d 946 (8th Cir. 1940), rejected the non-moving party's contention that the case should be distinguished from other rule 55(b)(2) notice cases because the trial court had found that no showing of prejudice to the plaintiff had been made. *Id.* at 947-48.

190. Prior to 1970, 13 cases dealt with the issue of the effect of the failure to receive rule 55(b)(2) notice. See note 189 *supra*; notes 195-99, 201 *infra*. Only three cases, however, adopted the "voidable" view. *Rutland Transit Co. v. Chicago Tunnel Terminal Co.*, 233 F.2d 655, 656 (7th Cir. 1956); *United States v. Borchers*, 163 F.2d 347, 349 (2d Cir.), *cert. denied*, 332 U.S. 811 (1947); *United States ex rel Knapfer v. Watkins*, 159 F.2d 675, 677 (2d Cir. 1947).

191. After 1970, 14 cases dealt with the issue of the effect of the failure to receive rule 55(b)(2) notice. See note 189 *supra*; notes 195-99, 204 *infra*. Only four cases not adopt the "voidable" view. *Magette v. Daily Post*, 535 F.2d 856, 857 (3d Cir. 1976) (per curiam); *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 692 (D.C. Cir. 1970) (per curiam); *United States v. One 1966 Chevrolet Pickup Truck*, 56 F.R.D. 459, 462 (E.D. Tex. 1972); *United States v. Melichar*, 56 F.R.D. 49, 50 (E.D. Wis. 1972).

rounding circumstances and will, at times, be harmless.”<sup>192</sup> Under this view, lack of notice is not dispositive of the set aside motion. Instead, it is considered merely to be one of several factors that a court should evaluate when determining whether a movant’s delay is excusable according to the standards of rule 60(b).<sup>193</sup>

Professor Moore argues that cases involving lack of rule 55(b)(2) notice should be decided under rule 60(b)(1) or (6), instead of subdivision (4).<sup>194</sup> Unfortunately, few courts clearly specify under which subdivision they are deciding the case. The Second,<sup>195</sup> Seventh,<sup>196</sup>

192. 6 J. Moore, *Federal Practice* ¶ 55.05[4], at 55-57 (2d ed. 1976) (footnote omitted); *accord*, *Wilson v. Moore and Assocs.*, 564 F.2d 366, 369 (9th Cir. 1977); *Winfield Assocs. v. Stonecipher*, 429 F.2d 1087, 1091 (10th Cir. 1970); *Rutland Transit Co. v. Chicago Tunnel Terminal Co.*, 233 F.2d 655, 656 (7th Cir. 1956); *Collex, Inc. v. Walsh*, 84 F.R.D. 443 (E.D. Pa. 1977); *United States v. Martin*, 395 F. Supp. 954, 960 (S.D.N.Y. 1975); *United States v. Manos*, 56 F.R.D. 655, 658-59 (S.D. Ohio 1972). Fed. R. Civ. P. 61, entitled “Harmless Error,” provides that “[n]o error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.” Few courts refer explicitly to rule 61 in their consideration of the effect of failure to receive rule 55(b)(2) notice. Logically, however, this rule provides the means by which an otherwise void judgment can be viewed as merely voidable. One court has explicitly employed rule 61 for this purpose. *United States v. Borchers*, 163 F.2d 347, 349 (2d Cir.), *cert. denied*, 332 U.S. 811 (1947). Others implicitly do so by adopting Professor Moore’s language that the failure to receive notice “will, at times, be harmless.” 6 J. Moore, *Federal Practice* ¶ 55.05[4], at 55-57 (2d ed. 1976). In response to the question, “Professor Moore has suggested that failure to notify the defendant once an appearance has been made is a serious error, but not necessarily sufficient to set aside a default judgment. Do you agree,” 18 judges who responded to our questionnaire indicated that they agreed, while 13 judges indicated that they disagreed. *See* note 8 *supra*.

193. In *Collex, Inc. v. Walsh*, 74 F.R.D. 443 (E.D. Pa. 1977), the court rejected the view that failure to receive rule 55(b)(2) notice necessarily renders a judgment void. The court argued that failure to receive notice “is to be considered in light of all of the surrounding circumstances and other facts of record in accordance with criteria which govern a Rule 60(b) decision.” *Id.* at 449. If the judgment is viewed as not necessarily void under subdivision (4), other statutory grounds for relief must be considered. A party may be required to show the presence of a meritorious defense and lack of prejudice to the non-moving party. *See* notes 194, 213 *infra* and accompanying text.

194. 7 J. Moore, *Federal Practice* ¶ 60.25[2], at 310-11 (2d ed. 1979).

195. *United States v. Borchers*, 163 F.2d 347, 349 (2d Cir.), *cert. denied*, 332 U.S. 811 (1947); *United States ex rel Knapfer v. Watkins*, 159 F.2d 675, 677 (2d Cir. 1947).

196. *Rutland Transit Co. v. Chicago Tunnel Terminal Co.*, 233 F.2d 655, 656 (7th Cir. 1956); *cf.* *A.F. Dormeyer Co. v. M.J. Sales & Distrib. Co.*, 461 F.2d 40, 43 (7th Cir. 1972) (implicitly adopting “voidable” view).



Ninth,<sup>197</sup> and Tenth Circuits,<sup>198</sup> and some district courts,<sup>199</sup> however, have expressly adopted the "voidable" view and many have explicitly based their decisions on the grounds of rule 60(b)(1) or (6).<sup>200</sup> The Fifth Circuit's reliance on subdivision (6) reflects an implicit adoption of the "voidable" view.<sup>201</sup> The remaining Circuit courts either still adhere to the "void" view or are silent on the issue.<sup>202</sup>

Courts employing the "voidable" approach have found the lack of formal notice to be harmless when the movant either received actual notice<sup>203</sup> or would have received it had he pursued his case with greater diligence.<sup>204</sup> The same result has been reached when evidence showed that the movant had previously abandoned his claim,<sup>205</sup> indicated that he had no defense to the action,<sup>206</sup> or bypassed his legal

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197. *Wilson v. Moore and Assocs.*, 564 F.2d 366, 369-70 (9th Cir. 1977).

198. *Brown v. McCormick*, 608 F.2d 410, 413-14 (10th Cir. 1979); *Winfield Assocs. v. Stonecipher*, 429 F.2d 1087, 1091 (10th Cir. 1970).

199. *Collex, Inc. v. Walsh*, 74 F.R.D. 443, 448 (E.D. Pa. 1977); *United States v. Martin*, 395 F. Supp. 954, 960-61 (S.D.N.Y. 1975); *United States v. Manos*, 56 F.R.D. 655, 658 (S.D. Ohio 1972).

200. *A.F. Dormeyer Co. v. M.J. Sales & Distrib. Co.*, 461 F.2d 40, 43 (7th Cir. 1972) (motion granted under subdivision (1)); *Rutland Transit Co. v. Chicago Tunnel Terminal Co.*, 233 F.2d 655, 656 (7th Cir. 1956) (relief unavailable under either subdivision (1) or (6)); *Collex, Inc. v. Walsh*, 74 F.R.D. 443, 447-48 (E.D. Pa. 1977) (motion denied under subdivision (6)); *United States v. Manos*, 56 F.R.D. 655, 661 (S.D. Ohio 1972) (motion denied under subdivision (6)).

201. *Turner v. Salvatierra*, 580 F.2d 199, 201 (5th Cir. 1978) (per curiam) (motion granted under subdivision (6)); *Charlton L. Davis & Co. v. Fedder Data Center, Inc.*, 556 F.2d 308, 309 (5th Cir. 1977) (same).

202. The Third and District of Columbia Circuits apparently still follow the void view. *Magette v. Daily Post*, 535 F.2d 856, 857 (3d Cir. 1976) (per curiam); *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 692 (D.C. Cir. 1970) (per curiam). The First, Fourth, Sixth, and Eighth Circuits are silent on the issue.

203. *E.g.*, *Wilson v. Moore and Assocs.*, 564 F.2d 366, 369 (9th Cir. 1977) (written warning to defendant to secure counsel and to answer complaint provided unqualified notice). The *Wilson* court stated, in dicta, that "[a]lthough written notice is contemplated, it need not necessarily be in any particular form. The major consideration is that the party is made aware that a default judgment may be entered against him." *Id.* (quoting 10 C. Wright & A. Miller, *supra* note 10, § 2657). *But cf.* *Swallow v. United States*, 380 F.2d 710, 712 (10th Cir. 1967) (receipt of actual notice one day prior to hearing did not remedy deficiency in formal notice).

204. *E.g.*, *Port-Wide Container Co. v. Interstate Maintenance Corp.*, 440 F.2d 1195, 1196 (3d Cir. 1971) (per curiam) (written notice hand-delivered to secretary in movant's office who failed to deliver it to movant).

205. *E.g.*, *United States v. Borchers*, 163 F.2d 347, 349 (2d Cir.), *cert. denied*, 332 U.S. 811 (1947); *United States ex rel. Knupfer v. Watkins*, 159 F.2d 675, 677 (2d Cir. 1947). Both cases involved denaturalization proceedings against parties who renounced their citizenship. One defendant even withdrew his answer. *United States v. Borchers*, 163 F.2d at 349. The court deemed that such conduct rendered the lack of rule 55(b)(2) notice harmless. *Id.*

206. *Rutland Transit Co. v. Chicago Tunnel Terminal Co.*, 233 F.2d 655, 657 (7th Cir. 1956).

right of appeal.<sup>207</sup> One result of the trend toward adopting the view that failure to receive notice merely renders the judgment voidable is that the focus of the cases has shifted away from determining whether an appearance was made.<sup>208</sup> Instead, courts will view the failure to receive notice in the totality of the circumstances<sup>209</sup> and employ criteria normally governing rule 60(b) motions.<sup>210</sup> One district court rationalized its adoption of the "voidable" view by noting that it would be "the ultimate triumph of form over substance"<sup>211</sup> to allow the movant to invoke equitable principles in the determination of whether he appeared and then to bar the court from considering the same principles in determining whether the judgment should be set aside.<sup>212</sup> That court went so far as to deny the set aside motion even though it found that the party had appeared and had not received notice.<sup>213</sup> Several other courts have reached the same result by assuming an appearance.<sup>214</sup> Following Professor Moore's view, these cases treat the lack of notice as a procedural irregularity rather than a substantive or jurisdictional defect.<sup>215</sup>

It seems, therefore, that the adoption of the "voidable" view has increased the likelihood that a motion to set aside a default judgment will not be granted.<sup>216</sup> In light of this trend, parties and their lawyers

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207. *Winfield Assocs. v. Stonecipher*, 429 F.2d 1087, 1091 (10th Cir. 1970).

208. The appearance issue is no longer dispositive. Instead, modern courts focus on the effect on the movant of his failure to receive notice. For example, if the movant received actual or constructive notice, bypassed his legal remedy of appeal, or indicated he had no defense to the action, the effect on the movant can be viewed as negligible. See note 203 *supra* and accompanying text.

209. In *United States v. Martin*, 395 F. Supp. 954 (S.D.N.Y. 1975), the court contended that "[t]he Court must consider the significance of the lack of notice in light of all the circumstances." *Id.* at 960-61; see cases cited note 192 *supra*.

210. *E.g.*, *A.F. Dormeyer Co. v. M.J. Sales & Distrib. Co.*, 461 F.2d 40, 43 (7th Cir. 1972) (motion granted based on a showing of excusable neglect and the presence of a meritorious defense); *Rutland Transit Co. v. Chicago Tunnel Terminal Co.*, 233 F.2d 655, 659 (7th Cir. 1956) (motion denied due to failure to show inadvertance or excusable neglect); *Collex, Inc. v. Walsh*, 74 F.R.D. 443, 449 (E.D. Pa. 1977) (motion denied because of inexcusable neglect, lack of a meritorious defense, and the existence of prejudice).

211. *Collex, Inc. v. Walsh*, 74 F.R.D. 443, 448 (E.D. Pa. 1977).

212. *Id.* at 448-49.

213. *Id.* at 451.

214. *E.g.*, *Winfield Assocs. v. Stonecipher*, 429 F.2d 1087, 1091 (10th Cir. 1970); *United States v. Borchers*, 163 F.2d 347, 349 (2d Cir.), *cert. denied*, 332 U.S. 811 (1947); *United States ex rel. Knupfer v. Watkins*, 159 F.2d 675, 677 (2d Cir. 1947); *United States v. Martin*, 395 F. Supp. 954, 960 (S.D.N.Y. 1975); *United States v. Manos*, 56 F.R.D. 655, 658 (S.D. Ohio 1972). Even in a case in which no appearance was found, the judge noted that the same result would obtain even if the movant had appeared. *Rutland Transit Co. v. Chicago Tunnel Terminal Co.*, 233 F.2d 655, 658-59 (7th Cir. 1956).

215. See note 192 *supra* and accompanying text.

216. Of the 12 cases adopting the "voidable" view, see notes 195-99, 201 *supra*, in only three were the set aside motions granted. *Turner v. Salvatierra*, 580 F.2d 199

should be wary of relying on the failure to receive formal notice of the application for a default judgment as the sole ground for relief from that judgment.

### III. JUDICIALLY CREATED REQUIREMENTS FOR SETTING ASIDE DEFAULT JUDGMENTS

#### A. *Meritorious Defense Requirement*

##### 1. Judicial Treatment of the Meritorious Defense Requirement

The requirement that a movant attempting to set aside a default judgment show that he has a meritorious defense to the suit is not mandated by rule 60(b).<sup>217</sup> Indeed, in many of the reported cases involving a discretionary decision by the court,<sup>218</sup> this factor has not been considered in the disposition of the motion. Some courts have not even referred to the concept,<sup>219</sup> leading to speculation either that they have not imposed a showing of a meritorious defense onto the requirements contained in the rule, or that the presence of other factors made it unnecessary to reach the meritorious defense issue. Other courts have acknowledged the merits of the movant's defense as a factor to be considered, but have clearly specified that the inexcusability of the delay was controlling.<sup>220</sup>

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(5th Cir. 1978) (per curiam); *Charlton L. Davis & Co. v. Fedder Data Center, Inc.*, 556 F.2d 308 (5th Cir. 1977); *A.F. Dormeyer Co. v. M.J. Sales & Distrib. Co.*, 461 F.2d 40 (7th Cir. 1972).

217. See Fed. R. Civ. P. 60(b).

218. Discretion is involved in all set aside motions except when the court is found to lack jurisdiction. See note 37 *supra*.

219. E.g., *Ben Sager Chems. Int'l, Inc. v. E. Targosz & Co.*, 560 F.2d 805 (7th Cir. 1977); *Davis v. Safeway Stores, Inc.*, 532 F.2d 489 (5th Cir. 1976) (per curiam); *Savarese v. Edrick Transfer & Storage, Inc.*, 513 F.2d 140 (9th Cir. 1975); *Standard Newspapers, Inc. v. King*, 375 F.2d 115 (2d Cir. 1967) (per curiam); *Allen v. Jacobson*, 82 F.R.D. 355 (N.D. Tex. 1979); *Greene v. Pyatt*, 78 F.R.D. 362 (E.D.N.Y. 1978); *Aberson v. Glassman*, 70 F.R.D. 683 (S.D.N.Y. 1976) (default); *Titus v. Smith*, 51 F.R.D. 224 (E.D. Pa. 1970) (default).

220. E.g., *United States v. Ciriame*, 535 F.2d 736, 741 (2d Cir. 1976) (court noted that argument that movant had meritorious defense was "plausible but . . . not determinative"), *rev'd on other grounds*, 563 F.2d 26 (2d Cir. 1977); *Central Operating Co. v. Utility Workers of Am.*, 491 F.2d 245, 252-53 (4th Cir. 1974) (court noted that movant probably made "sufficient showing" of meritorious defense but it upheld denial of motion due to delay in filing); *Rutland Transit Co. v. Chicago Tunnel Terminal Co.*, 233 F.2d 655, 659 (7th Cir. 1956) (court stated that due to the inexcusability of delay it was "unnecessary to discuss the issue of a meritorious defense"); *Spica v. Garczynski*, 78 F.R.D. 134, 136 (E.D. Pa. 1978) (default) (court acknowledged presence of meritorious defense but denied motion due to inexcusable delay); *Caputo v. Globe Indem. Co.*, 41 F.R.D. 436, 439, 441 (E.D. Pa. 1967) (though noting that parties had stipulated as to presence of meritorious defense and that issue of its presence was "not without significance," court denied motion due to movant's negligence); *Nelson v. Coleman Co.*, 41 F.R.D. 7, 10 (D.S.C. 1966) (default) (court acknowledged presence of meritorious defense but denied motion due to inexcusable

When it is considered, this judicially created requirement has been used for different purposes. The presence of a particularly meritorious defense has prompted some courts predisposed to a trial on the merits to be more lenient in their treatment of the movant's delay.<sup>221</sup> For example, in *Medunic v. Lederer*,<sup>222</sup> the court held "that a district court cannot rest its denial of a motion to set aside a default judgment on the defendant's negligent failure to timely plead to a complaint, without determining . . . whether a meritorious defense has been presented in support of the set aside motion."<sup>223</sup>

Other courts have used the meritorious defense requirement to further the interests of judicial economy.<sup>224</sup> As one court noted, "[a]bsent a meritorious defense, the reopening of the judgment would be a futile act, imposing an unnecessary burden on the court."<sup>225</sup>

delay); *Morrisey v. Crabtree*, 143 F. Supp. 105, 106 (M.D.N.C. 1956) (court noted that usually default judgment is vacated when meritorious defense exists but denied motion due to movant's "fault" in causing delay); *United States v. Knox*, 79 F. Supp. 714, 715 (E.D. Tenn. 1948) (court refused to consider possible merits of movant's defense to action as it was "no reason for setting aside a default judgment"); *Ledwith v. Storkan*, 2 F.R.D. 539, 542, 545 (D. Neb. 1942) (court assumed that "defendants might have had a valid defense at least in part to the plaintiff's complaint" but denied motion on grounds of inexcusable delay).

221. In *Schwab v. Bullock's Inc.*, 508 F.2d 353 (9th Cir. 1974), the appellate court reversed the lower court's denial of the motion, stating that, "[t]he meritoriousness of the defense coupled with the lack of any significant prejudice to plaintiff should have led the district court to resolve in [the movant's] favor any doubts in connection with the motion to vacate." *Id.* at 355. In *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242 (3d Cir. 1951), the court stated that "[w]hat is excusable neglect and what is inexcusable neglect can hardly be determined in a vacuum." *Id.* at 245. Instead, the possibility of a meritorious defense to the suit must also be considered for it "is always an important factor in the consideration of a motion to set aside a default judgment." *Id.* at 244-45. For some courts, the presence of a meritorious defense is more significant when the movant is seeking to set aside a default under rule 55(c). In *Brogie v. Mackay-Smith*, 75 F.R.D. 739 (W.D. Va. 1977), the court noted that, "[w]hen the issue is one of whether to set aside an entry of default . . . it is not absolutely necessary that the neglect . . . be excusable . . . Courts have been more willing to grant relief to a defaulting party when that party has acted with reasonable promptness [and] has provided underlying facts in support of a claim of a meritorious defense." *Id.* at 742 (citations omitted); *accord*, *Mitchell v. Eaves*, 24 F.R.D. 434, 435 (E.D. Tenn. 1959).

222. 533 F.2d 891 (3d Cir. 1976).

223. *Id.* at 893.

224. In *McCloskey & Co. v. Eckart*, 164 F.2d 257 (5th Cir. 1947) (default), the appellate court agreed with the lower court's statement that the first issue to be resolved in considering the set aside motion is whether a defense is present. *Id.* at 258. If it is, "the Court may permit [the judgment] to be opened; but if not, it would be an idle gesture." *Id.* In *Gomes v. Williams*, 420 F.2d 1364 (10th Cir. 1970), the court, though noting the judicial preference for a trial on the merits, stated that competing considerations require the defaulting party to show "that he has a meritorious defense to the action." *Id.* at 1366 (footnote omitted).

225. *United States v. \$3,216.59 in United States Currency*, 41 F.R.D. 433, 434 (D.S.C. 1967).

Thus, even if the delay were deemed excusable, the default judgment would not be set aside absent a showing of a defense to the suit.<sup>225</sup>

## 2. What Constitutes a Meritorious Defense

Courts have varied greatly in setting standards for establishing the existence of a meritorious defense. The burden of proof a court imposes on the movant may be an indication of whether the court is more concerned with judicial economy or with giving the movant an opportunity to present his evidence at a formal trial.<sup>227</sup> In the majority of cases, the movant outlines the facts of his intended defense.<sup>228</sup> Those courts adopting a liberal approach to the meritorious defense

226. In *Williams v. Ward*, 556 F.2d 1143 (2d Cir.), *cert. dismissed*, 434 U.S. 944 (1977), the appellate court accepted the lower court's holding that a motion to set aside a default could be denied due to a lack of a meritorious defense. *Id.* at 1149. Nevertheless, the court reversed because the movant had a complete defense. *Id.* at 1150-62. In *Atlantic Steamers Supply Co. v. International Maritime Supplies Co.*, 268 F. Supp. 1009 (S.D.N.Y. 1967) (default), the court stated that "[e]ven if we were inclined under Rule 60(b) to relieve the defendant from [the] default because of . . . excusable neglect, the defendant has failed to submit a sufficient affidavit of merits." *Id.* at 1011. Some courts have conspicuously noted the failure of the movant to at least allege a meritorious defense. In *Moldwood Corp. v. Stutts*, 410 F.2d 351 (5th Cir. 1969), the court stated that it "would be quickly persuaded to give [the movant] relief if . . . he had given the District Court even a hint of a suggestion that he had a meritorious defense." *Id.* at 352; *accord*, *Ralston Purina Co. v. Navieras de Canarias, S.A.*, 619 F.2d 152, 153 (1st Cir. 1980); *American & Foreign Ins. Ass'n v. Commercial Ins. Co.*, 575 F.2d 980, 983 (1st Cir. 1978); *Trachtman v. T.M.S. Realty and Financial Servs.*, 393 F. Supp. 1342, 1347 (E.D. Pa. 1975) (default); *Associated Press v. J.B. Broadcasting, Ltd.*, 54 F.R.D. 563, 564 (D. Md. 1972); *Wagg v. Hall*, 42 F.R.D. 589, 591 (E.D. Pa. 1967); *United States v. Fong*, 182 F. Supp. 446, 454 (N.D. Cal. 1959) (default), *aff'd*, 300 F.2d 400 (9th Cir.), *cert. denied*, 370 U.S. 935 (1962). *But see* note 230 *infra* and accompanying text.

227. Few courts have articulated the purpose for the meritorious defense requirement. In only four cases have the courts clearly implied that the meritorious defense factor should be used to increase the movant's chances of obtaining relief from the default or default judgment so as to permit a trial on the merits. *See Medunic v. Lederer*, 533 F.2d 891, 893 (3d Cir. 1976); *Schwab v. Bullock's Inc.*, 508 F.2d 353, 355 (9th Cir. 1974); *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 244-45 (3d Cir. 1951); *Broglie v. Mackay-Smith*, 75 F.R.D. 739, 742 (W.D. Va. 1977) (default). Alternatively, only four cases were found in which the courts have linked the meritorious defense requirement and judicial economy. *See Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970); *McCloskey & Co. v. Eckart*, 164 F.2d 257, 258 (5th Cir. 1947) (default); *Tri-Continental Leasing Corp. v. Zimmerman*, 485 F. Supp. 495, 497 (N.D. Cal. 1980) (default); *United States v. \$3,216.59 in United States Currency*, 41 F.R.D. 433, 434 (D.S.C. 1967). Professor Moore has stated that the requirement serves the interest of judicial economy and is a necessary countervailing factor to the statutory requirements of rule 55(c) and rule 60(b). The rules, he argues, "on their face seem designed" to accomplish the goal "of a just resolution of the particular dispute" over that of "the need for prompt and efficient handling of litigation." 6 J. Moore, *Federal Practice* ¶ 55.10[4], at 55-251 to -252 (2d ed. 1976).

228. *See* notes 229, 248-50 *infra*.

factor accept the movant's factual allegations as true, and, therefore, find a meritorious defense.<sup>229</sup> Other courts have been even more liberal. The most striking example occurs when a court grants the set aside motion with no discussion of the merits of the movant's defense.<sup>230</sup> In other cases, a movant's unsubstantiated claim that he has a meritorious defense to the action<sup>231</sup> or his denial of the allegations in the complaint<sup>232</sup> has been held sufficient to satisfy the requirement.

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229. *Turner v. Salvatierra*, 580 F.2d 199, 201 (5th Cir. 1978) (per curiam); *Charlton L. Davis & Co. v. Fedder Data Center, Inc.*, 556 F.2d 308, 309 (5th Cir. 1977); *Central Operating Co. v. Utility Workers of Am.*, 491 F.2d 245, 252 n.8 (4th Cir. 1974); *Thorpe v. Thorpe*, 364 F.2d 692, 694 n.4 (D.C. Cir. 1966); *Hutton v. Fisher*, 359 F.2d 913, 915 (3d Cir. 1966); *Provident Security Life Ins. Co. v. Gorsuch*, 323 F.2d 839, 840-43 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964); *Rooks v. American Brass Co.*, 263 F.2d 166, 169 (6th Cir. 1959) (per curiam); *Reynal v. United States*, 153 F.2d 929, 930 n.5 (5th Cir. 1945); *Insurance Co. of N. Am. v. S.S. Hellenic Patriot*, 87 F.R.D. 136, 138 (S.D.N.Y. 1980); *Altschul v. Paine Webber, Inc.*, 488 F. Supp. 858, 859-60 (S.D.N.Y. 1980) (default); *Morris v. Charnin*, 85 F.R.D. 689, 690 (S.D.N.Y. 1980); *United States v. Berger*, 86 F.R.D. 713, 714 (W.D. Pa. 1980); *Caruso v. Drake Motor Lines, Inc.*, 78 F.R.D. 586, 588-89 (E.D. Pa. 1978); *Thorne v. Pennsylvania*, 77 F.R.D. 396, 398-99 (E.D. Pa. 1977); *New York State Health Facilities Ass'n v. Carey*, 76 F.R.D. 128, 133 (S.D.N.Y. 1977); *Brogie v. Mackay-Smith*, 75 F.R.D. 739, 742 (W.D. Va. 1977) (default); *Hamilton v. Edell*, 67 F.R.D. 18, 20-21 (E.D. Pa. 1975) (default); *Morisse v. Defensive Instruments, Inc.*, 55 F.R.D. 433, 435 (E.D. Wis. 1972); *Kinnear Corp. v. Crawford Door Sales Co.*, 49 F.R.D. 3, 8 (D.S.C. 1970); *SEC v. Vogel*, 49 F.R.D. 297, 300 (S.D.N.Y. 1969) (default); *Horn v. Intelectron Corp.*, 294 F. Supp. 1153, 1155-56 (S.D.N.Y. 1968); *Stuski v. United States Lines*, 31 F.R.D. 188, 191 (E.D. Pa. 1962) (default); *United States v. Small*, 24 F.R.D. 429, 430-31 (S.D.N.Y. 1959); *Minneapolis Brewing Co. v. Merritt*, 143 F. Supp. 146, 149 (D.N.D. 1956).

230. After granting the set aside motion, the court in *United States v. \$3,976.62 in Currency*, 37 F.R.D. 564 (S.D.N.Y. 1965), specifically stated that the merits of the movant's defense to the suit "are of no present concern to this Court." *Id.* at 566; *accord*, *Edwin Raphael Co. v. Maharam Fabrics Corp.*, 283 F.2d 310 (7th Cir. 1960); *Gill v. Stalow*, 240 F.2d 669 (2d Cir. 1957); *Wilson v. Winstead*, 84 F.R.D. 218 (E.D. Tenn. 1979) (default); *Kennerly v. Aro, Inc.*, 447 F. Supp. 1083 (E.D. Tenn. 1977) (default); *Singer Co. v. Greever and Walsh Wholesale Textile, Inc.*, 82 F.R.D. 1 (E.D. Tenn. 1977) (default); *Johnson v. Harper*, 66 F.R.D. 103 (E.D. Tenn. 1975) (default); *Boyer v. Wisconsin*, 55 F.R.D. 90 (E.D. Wis. 1972) (default); *Heinert v. Johnson*, 319 F. Supp. 201 (D.C.Z. 1970); *Bedard v. Consolidated Mut. Ins. Co.*, 313 F. Supp. 1020 (D.P.R. 1970) (default); *Gillespie v. Hysmith*, 44 F.R.D. 476 (W.D. Pa. 1968) (default); *United States v. 96 Cases, More or Less, of Fireworks*, 244 F. Supp. 272 (N.D. Ohio 1965); *Teal v. King Farms Co.*, 18 F.R.D. 447 (E.D. Pa. 1955) (default); *Ellington v. Milne*, 14 F.R.D. 241 (E.D.N.C. 1953) (default); *Williams v. Cal Indus., Int'l*, 2 Bankr. Rep. (West) 76 (Bankr. D. Or. 1979).

231. The court in *Rasmussen v. W.E. Hutton & Co.*, 68 F.R.D. 231 (N.D. Ga. 1975) (default), stated that "[a]lthough [the defendant] has done nothing more than allege a meritorious defense . . . the Court does not think the . . . allegations are so insubstantial as to preclude . . . the setting aside of the default. Also, it is noteworthy that some courts do not require elaboration on the facts underlying a meritorious defense; allegation of the defense will suffice." *Id.* at 234; *accord*, *Jackson v. Beech*, 636 F.2d 831, 837 (D.C. Cir. 1980); *A.F. Dormeyer Co. v. M.J. Sales & Distrib. Co.*, 461 F.2d 40, 43 (7th Cir. 1972); *United States v. Berger*, 86 F.R.D. 713, 715

Within this liberal framework, *Trueblood v. Grayson Shops, Inc.*<sup>233</sup> and *Tolson v. Hodge*<sup>234</sup> represent the most innovative approaches to deciding the quality of the evidence sufficient to establish a meritorious defense. In *Trueblood*, the court inferred the existence of a meritorious defense from "the very nature of plaintiff's complaint [that] gives rise to the belief that cases where persons slip on the floor of a store are customarily defended with varying degrees of merit."<sup>235</sup> In *Tolson*, a case in which the plaintiff defaulted by failing to file a timely answer to a counterclaim,<sup>236</sup> the court inferred a meritorious defense from an earlier pleading.<sup>237</sup> The court noted that the "plaintiff alleged in his complaint that the sole proximate cause . . . was defendant's decedent's negligence. If established at trial this would constitute a complete defense . . . . Thus, one of plaintiff's intended defenses to the counterclaim had already been pleaded."<sup>238</sup>

The justification for liberal treatment of the requirement is that default judgments are not favored in the law because they deprive a party of a trial on the merits.<sup>239</sup> Consequently, the grounds for setting it aside are to be liberally construed<sup>240</sup> with any doubt resolved in favor of the movant.<sup>241</sup> Bias in favor of the movant while consider-

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(W.D. Pa. 1980); *Wagg v. Hall*, 42 F.R.D. 589, 591 (E.D. Pa. 1967); *Kulakowich v. A/S Borgestad*, 36 F.R.D. 185, 186 (E.D. Pa. 1964) (default); *A.C. Samford, Inc. v. United States*, 226 F. Supp. 72, 76 (M.D. Ga. 1963) (default); *Dalminter, Inc. v. Jessie Edwards, Inc.*, 27 F.R.D. 491, 492 (S.D. Tex. 1961); *Alopuri v. O'Leary*, 154 F. Supp. 78, 81 (E.D. Pa. 1957) (default); *Huntington Cab Co. v. American Fidelity & Cas. Co.*, 4 F.R.D. 496, 497 (S.D.W. Va. 1945); *Standard Grate Bar Co. v. Defense Plant Corp.*, 3 F.R.D. 371, 372 (M.D. Pa. 1944); *United States ex rel. Kantor Bros. v. Mutual Constr. Corp.*, 3 F.R.D. 227, 228 (E.D. Pa. 1943). Ten of the 29 judges who clearly responded to the question, "[i]n establishing [the existence of a meritorious] defense, must specific facts be shown or is [a] mere allegation . . . sufficient" indicated that, in most situations, the mere allegation that such a defense exists would be sufficient. See note 8 *supra*.

232. In *Woods v. Severson*, 9 F.R.D. 84 (D. Neb. 1948), the court stated that "[t]he proposed answer admits only the defendant's name, residence, and ownership of the designated real property. All other allegations of the complaint . . . are denied. Such a pleading . . . states a defense to the plaintiff's claim." *Id.* at 86; *accord*, *Patapoff v. Vollstedt's Inc.*, 267 F.2d 863, 865 (9th Cir. 1959); *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 244 (3d Cir. 1951).

233. 32 F.R.D. 190 (E.D. Va. 1963).

234. 411 F.2d 123 (4th Cir. 1969).

235. 32 F.R.D. at 196.

236. 411 F.2d at 125.

237. *Id.* at 130. In *Elias v. Pitucci*, 13 F.R.D. 13 (E.D. Pa. 1952) (default), the movant's defense was inferred by the court from the pleadings of the adversary. *Id.* at 14.

238. 411 F.2d at 130.

239. See note 45 *supra* and accompanying text.

240. See note 46 *supra* and accompanying text.

241. See note 49 *supra* and accompanying text.

ing the proffered defense, however, is significantly different from an uncritical acceptance or assumption that such a defense exists. The competing concern for judicial economy also deserves consideration.<sup>242</sup> If the defaulting party has no defense to the suit, setting aside a default judgment for the academic exercise of litigating the merits is not only futile, but also wasteful.<sup>243</sup>

Perhaps recognizing this problem, other courts have modified or rejected the standards adopted by the more liberal courts and established more rigorous standards of proof for showing the existence of a meritorious defense.<sup>244</sup> *Tri-Continental Leasing Corp. v. Zimmerman*<sup>245</sup> specifically established a nexus between rigorous standards of proof and judicial economy.<sup>246</sup> The court stated that "[c]ontrary authority indicating that the party in default need only

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242. Some courts have stressed the importance of judicial economy. In *Cliff v. PPX Publishing Co.*, 84 F.R.D. 369 (S.D.N.Y. 1979), the court refused to set aside the default judgment of approximately \$93,000. As one of the reasons for its holding, the court noted the "pressing need to keep current with our trial calendar in this congested court." *Id.* at 371; *accord*, *Dolphin Plumbing Co. v. Financial Corp. of N. Am.*, 508 F.2d 1326, 1327 (5th Cir. 1975) (per curiam); *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970); *Bell Tel. Labs., Inc. v. Hughes Aircraft Co.*, 73 F.R.D. 16, 22 (D. Del. 1976); *Aberson v. Glassman*, 70 F.R.D. 683, 684 (S.D.N.Y. 1976) (default); *Kostenbauder v. Secretary, HEW*, 71 F.R.D. 449, 453 (M.D. Pa. 1976), *aff'd mem. sub nom.* *Kostenbauder v. Weinberger*, 556 F.2d 567 (3d Cir. 1977).

243. See notes 224-25 *supra* and accompanying text.

244. *Olson v. Stone*, 588 F.2d 1316, 1319-22 (10th Cir. 1978); *FTC v. Packers Brand Meats, Inc.*, 562 F.2d 9, 10 n.3 (8th Cir. 1977) (per curiam); *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970); *Madsen v. Bumb*, 419 F.2d 4, 6 (9th Cir. 1969) (default); *Consolidated Masonry & Fireproofing, Inc. v. Wagnan Constr. Corp.*, 383 F.2d 249, 252 (4th Cir. 1967); *McCloskey & Co. v. Eckart*, 164 F.2d 257, 258-60 (5th Cir. 1947) (default); *Jackson v. Heiser*, 111 F.2d 310, 313 (9th Cir. 1940); *Pennsylvania Nat'l Bank & Trust Co. v. American Home Assurance Co.*, 87 F.R.D. 152, 155-56 (E.D. Pa. 1980); *Tri-Continental Leasing Corp. v. Zimmerman*, 485 F. Supp. 495, 497 (N.D. Cal. 1980) (default); *Reid v. Liberty Consumer Discount Co.*, 484 F. Supp. 435, 439-42 (E.D. Pa. 1980); *General Tire & Rubber Co. v. Olympic Gardens, Inc.*, 85 F.R.D. 66, 69-70 (E.D. Pa. 1979); *Bell Tel. Labs., Inc. v. Hughes Aircraft Co.*, 73 F.R.D. 16, 21-22 (D. Del. 1976); *Kostenbauder v. Secretary, HEW*, 71 F.R.D. 449, 453 (M.D. Pa. 1976), *aff'd mem. sub nom.* *Kostenbauder v. Weinberger*, 556 F.2d 567 (3d Cir. 1977); *United States v. Topeka Livestock Auction Inc.*, 392 F. Supp. 944, 951 (N.D. Ind. 1975) (default); *Ameday v. United States Trucking Co.*, 62 F.R.D. 72, 74 (E.D. Pa. 1974); *Design & Dev., Inc. v. Vibromatic Mfg., Inc.*, 58 F.R.D. 71, 77 (E.D. Pa. 1973); *Residential Reroofing Union Local 30-B v. Mezicco*, 55 F.R.D. 516, 518 (E.D. Pa. 1972); *Robinson v. Bantam Books, Inc.*, 49 F.R.D. 139, 140 (S.D.N.Y. 1970) (default); *Atlantic Steamers Supply Co. v. International Maritime Supplies Co.*, 268 F. Supp. 1009, 1011 (S.D.N.Y. 1967) (default); *Byron v. Bleakley Transp. Co.*, 43 F.R.D. 413, 415 (S.D.N.Y. 1967); *Nicholson v. Allied Chem. Corp.*, 200 F. Supp. 206, 206-07 (E.D. Pa. 1961); *Federal Enterprises, Inc. v. Frank Allbritten Motors, Inc.*, 16 F.R.D. 109, 112 (W.D. Mo. 1954); *Bowles v. Branick*, 66 F. Supp. 557, 558 (W.D. Mo. 1946).

245. 485 F. Supp. 495 (N.D. Cal. 1980) (default).

246. *Id.* at 497.



allege a meritorious defense . . . must be disregarded . . . . Such a rule would over emphasize the policy of disposing of cases on the merits at the expense of the counterbalancing considerations of judicial economy and efficiency."<sup>247</sup> Other courts, while accepting the movant's factual allegations as true, have served the interests of judicial economy by determining that the allegation did not constitute a legally sufficient defense.<sup>248</sup>

Additionally, some courts have held that a general denial<sup>249</sup> or a conclusory allegation that a defense to the action exists<sup>250</sup> is insufficient to show the existence of a meritorious defense. In *Olson v. Stone*,<sup>251</sup> the court acknowledged that the movant's version of the facts should be accepted as true.<sup>252</sup> The court also stated, however, that a general denial was insufficient to constitute a showing of a meritorious defense.<sup>253</sup> The movant's attorney objected to the application of this rule, arguing that because the case rested on whether the allegations of the complaint were true, "a defendant's denial of those factual assertions . . . would be an adequate defense at the time of trial."<sup>254</sup> The *Stone* court, however, held that "no meritorious defense showing was made"<sup>255</sup> because the movant failed to present "a sufficient elaboration of facts to permit the trial court to judge whether the defense, if movant's version were believed, would be

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247. *Id.* (citations omitted).

248. In *Olson v. Stone*, 588 F.2d 1316 (10th Cir. 1978), the court specifically stated that, in reviewing the movant's factual allegations, "the focus will be on the legal sufficiency of the allegations . . . rather than their truth." *Id.* at 1320; e.g., *Pennsylvania Nat'l Bank & Trust Co. v. American Home Assurance Co.*, 87 F.R.D. 152, 155-56 (E.D. Pa. 1980) (proffered defense would be barred by the state's "Dead Man's Statute"); *Williams v. Ward*, 416 F. Supp. 1123, 1124 (S.D.N.Y. 1976) (default) (proffered defense violates due process), *rev'd*, 556 F.2d 1143, 1150 (2d Cir.), *cert. dismissed*, 434 U.S. 944 (1977); *Design & Dev., Inc. v. Vibromatic Mfg., Inc.*, 58 F.R.D. 71, 73 (E.D. Pa. 1973) (proffered defense would be barred under controlling state law governing suits brought on a written contract).

249. *Olson v. Stone*, 588 F.2d 1316, 1319 (10th Cir. 1978); *Madsen v. Bumb*, 419 F.2d 4, 6 (9th Cir. 1969) (default).

250. *FTC v. Packers Brand Meats, Inc.*, 562 F.2d 9, 10 n.3 (8th Cir. 1977) (*per curiam*); *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970); *Consolidated Masonry & Fireproofing, Inc. v. Wagman Constr. Corp.*, 383 F.2d 249, 252 (4th Cir. 1967); *United States v. Topeka Livestock Auction, Inc.*, 392 F. Supp. 944, 951 (N.D. Ind. 1975) (default); *Robinson v. Bantam Books, Inc.*, 49 F.R.D. 139, 140 (S.D.N.Y. 1970) (default); *Federal Enterprises, Inc. v. Frank Allbritten Motors, Inc.*, 16 F.R.D. 109, 112 (W.D. Mo. 1954); *Bowles v. Branick*, 66 F. Supp. 557, 558 (W.D. Mo. 1946). Nineteen of the 29 judges who clearly responded to the question, "[i]n establishing [the existence of a meritorious] defense, must specific facts be shown or is [a] mere allegation . . . sufficient" indicated that they would require the movant to show specific facts. See note 8 *supra*.

251. 588 F.2d 1316 (10th Cir. 1978).

252. *Id.* at 1320.

253. *Id.* at 1319.

254. *Id.* at 1320.

255. *Id.* at 1322.

meritorious.”<sup>256</sup> Normally, a simple denial of “the averments upon which the adverse party relies”<sup>257</sup> leads to a trial<sup>258</sup> during which the defendant is given the opportunity to prove the truth of his position and thus avoid liability. It would follow that if the movant’s assertions are deemed to be true, a general denial would constitute a sufficient showing of a meritorious defense.<sup>259</sup>

Although many courts assume the truth of the movant’s version of the facts,<sup>260</sup> other courts that use the meritorious defense requirement to serve the interests of judicial economy<sup>261</sup> require some type of substantiation of the alleged defense.<sup>262</sup> Some courts have gone so far as

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256. *Id.* at 1319 (footnote omitted).

257. Fed. R. Civ. P. 8(b).

258. Fed. R. Civ. P. 8(b) outlines the form that an acceptable defense must take. The relevant part provides that “the pleader . . . may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits.” *Id.*

259. See cases cited note 232 *supra*.

260. See note 229 *supra*.

261. As noted, few courts have articulated the purpose of the meritorious defense requirement. See note 227 *supra* and accompanying text. Instructively, of the courts that have been more rigorous in reviewing the proof of the movant’s proffered defense, see note 244 *supra*, only five held that the movant met the burden of proof. *Ameday v. United States Trucking Co.*, 62 F.R.D. 72, 74 (E.D. Pa. 1974) (defense supported by independent and police reports); *Byron v. Bleakley Transp. Co.*, 43 F.R.D. 413, 415 (S.D.N.Y. 1967) (defense supported by affidavits and attached medical records); *Nicholson v. Allied Chem. Corp.*, 200 F. Supp. 206, 206-07 (E.D. Pa. 1961) (defense supported by witnesses). In *General Tire & Rubber Co. v. Olympic Gardens, Inc.*, 85 F.R.D. 66 (E.D. Pa. 1979), the court did not outline the evidence the movant offered in support of the defense. The court held, however, that the defense was sufficient despite the plaintiff’s “commendably thorough” attempt to rebut. *Id.* at 69. In *McCloskey & Co. v. Eckart*, 164 F.2d 257 (5th Cir. 1947), the appellate court carefully examined the defenses offered by the movant because the lower court had held that the defenses were legally insufficient. The court disagreed and reversed. *Id.* at 258-60.

262. In *Olson v. Stone*, 588 F.2d 1316 (10th Cir. 1978), the court merely noted that “a sufficient elaboration of facts” is required. *Id.* at 1319. It stated that the additional facts “may be satisfactorily presented in the written motion itself, in an appended proposed answer, or in attached affidavits.” *Id.* at 1319-20. In *Central Operating Co. v. Utility Workers of Am.*, 491 F.2d 245 (4th Cir. 1974), the court stated that the movant’s burden of showing a meritorious defense is met when he produces uncontradicted testimony which, if believed, would constitute a defense to the action. *Id.* at 252 n.8. By allowing the opposing party to contradict the movant’s allegations, the court underscores its rejection of the principle that those allegations be accepted as true. In *Madsen v. Bumb*, 419 F.2d 4 (9th Cir. 1969) (default), the court pointed out that, although the movant’s brief mentioned “various favorable evidence,” he failed to provide “supporting affidavits or documents,” nor did he “specify his potential witnesses.” *Id.* at 6. In *Assmann v. Fleming*, 159 F.2d 332 (8th Cir. 1947), the court stated that the movant’s allegations must be “properly verified.” *Id.* at 336. This verification requirement underscores the court’s implicit rejection of the notion that the movant’s allegations be accepted as true. In *Tri-Continental Leasing Corp. v. Zimmerman*, 485 F. Supp. 495 (N.D. Cal. 1980) (default), the court

to pass on the merits of the movant's claims.<sup>263</sup> Despite the concern for judicial economy,<sup>264</sup> the hearing on the set aside motion should not be a substitute for trial. A court is well-advised to require some evidence of the viability of the movant's defense so as not to waste time on a full trial. The movant, however, should be given the opportunity to prove his alleged defenses at trial rather than at the hearing.

### B. Prejudice

#### 1. Instances of Prejudice and Mitigation

In addition to requiring that the movant show both an excuse for his delay and a meritorious defense, some courts have also considered whether setting aside the judgment will result in substantial prejudice to the non-defaulting party,<sup>265</sup> or in some instances, to a third party.<sup>266</sup> For example, substantial prejudice has been found when a

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stated that the movant need not prove the existence of a meritorious defense by a preponderance of the evidence. Rather, he "only carries the burden of producing competent evidence that establishes a factual or legal basis for the tendered defense." *Id.* at 497. In *Kostenbauder v. Secretary*, HEW, 71 F.R.D. 449 (M.D. Pa. 1976), *aff'd mem. sub nom.* *Kostenbauder v. Weinberger*, 556 F.2d 567 (3d Cir. 1977), six plaintiffs sued the Secretary of Health Education and Welfare for benefits allegedly due under federal law. The defendant's motion for a summary judgment was taken by default because the plaintiffs failed to respond. The court, although confronted with the complaint, held that the movants had "a duty to make some demonstration that their position on the merits is likely to succeed." *Id.* at 453. The court did not discuss the type of evidentiary substantiation it required. Nevertheless, it apparently refused to accept the truth of the allegations contained in the complaint. In *Atlantic Steamers Supply Co. v. International Maritime Supplies Co.*, 268 F. Supp. 1009 (S.D.N.Y. 1967) (default), the court held that the movant's claim that his adversary breached three covenants was not sufficient to establish a meritorious defense as it was not "otherwise explained." *Id.* at 1011.

263. *E.g.*, *Tri-Continental Leasing Corp. v. Zimmerman*, 485 F. Supp. 495, 497-99 (N.D. Cal. 1980) (default); *Reid v. Liberty Consumer Discount Co.*, 484 F. Supp. 435, 439-40 (E.D. Pa. 1980); *Kostenbauder v. Secretary*, HEW, 71 F.R.D. 449, 453 (M.D. Pa. 1976), *aff'd mem. sub nom.* *Kostenbauder v. Weinberger*, 556 F.2d 565 (3d Cir. 1977); *Usery v. Weiner Bros.*, 70 F.R.D. 615, 617 (D. Conn. 1976); *Williams v. Ward*, 416 F. Supp. 1123, 1124 (S.D.N.Y. 1976) (default), *rev'd on other grounds*, 556 F.2d 1143 (2d Cir.), *cert. dismissed*, 434 U.S. 944 (1977); *Atlantic Steamers Supply Co. v. International Maritime Supplies Co.*, 268 F. Supp. 1009, 1011 (S.D.N.Y. 1967) (default). For a discussion of *Williams*, see note 225 *supra*.

264. See pt. I(B) *supra*.

265. *E.g.*, *Reid v. Liberty Consumer Discount Co.*, 484 F. Supp. 435, 438 (E.D. Pa. 1980); *Horn v. Intelectron Corp.*, 294 F. Supp. 1153, 1155 (S.D.N.Y. 1968); *Wagg v. Hall*, 42 F.R.D. 589, 590 (E.D. Pa. 1967). The lack of prejudice requirement has also been referred to as lack of intervening equities or lack of harm to the plaintiff. *E.g.*, *Mannke v. Benjamin Moore & Co.*, 375 F.2d 281, 285 (3d Cir. 1967) (default); *General Tel. Corp. v. General Tel. Answering Serv.*, 277 F.2d 919, 921 (5th Cir. 1960); *Barber v. Turberville*, 218 F.2d 34, 36 (D.C. Cir. 1954).

266. *E.g.*, *Ben Sager Chems. Int'l, Inc. v. E. Targosz & Co.*, 560 F.2d 805, 808 (7th Cir. 1977) (motion for relief denied as court found that plaintiff and one of movant's co-defendants were justified in relying on default judgment in making a

Federal Trade Commission investigation had been frustrated,<sup>267</sup> when the delay had led to loss of evidence,<sup>268</sup> when discovery had been stalled,<sup>269</sup> when the non-moving party had suffered undue loss of time and expense,<sup>270</sup> when the non-movant would have been forced to continue prosecuting against a meritless defense,<sup>271</sup> and when further delay would have thwarted the non-movant's ultimate recovery.<sup>272</sup>

Some courts have considered the potential prejudice to the movant resulting from denial of the motion when the amount in controversy is substantial.<sup>273</sup> In *Henry v. Metropolitan Life Insurance Co.*,<sup>274</sup> the district court held that "[m]atters involving such sums should not be

settlement and would be prejudiced if damage issue were to be relitigated); *New York State Health Facilities Ass'n v. Carey*, 76 F.R.D. 128, 133 (S.D.N.Y. 1977) (motion granted because New York State taxpayers, real parties in interest, ought not be punished for their attorney's neglect).

267. *FTC v. Packers Brand Meats, Inc.*, 562 F.2d 9, 10 n.3 (8th Cir. 1977) (motion for relief denied because movant refused to testify or produce documents at hearing in violation of subpoena and later refused to obey court order directing movant to show cause why subpoena should not be granted).

268. *United States v. Martin*, 395 F. Supp. 954, 961 (S.D.N.Y. 1975) (motion for relief denied when government claimed it would be prejudiced if it had to reconstruct evidence upon which it had based tax assessments at issue when movant waited three years before bringing rule 60(b) motion).

269. *Titus v. Smith*, 51 F.R.D. 224 (E.D. Pa. 1970) (default). In finding that the plaintiff would be prejudiced by stalled discovery if the motion were granted, the *Titus* court noted that "[a]s time passes, memories fade and documents are lost or destroyed. As the accessibility to the truth through discovery decreases, the opportunity for fraud and collusion increases." *Id.* at 227.

270. *Wilcox v. Triple D Corp.*, 78 F.R.D. 5, 7 (E.D. Va. 1978) (default) ("obvious" prejudice when non-moving party frustrated purposes of rules at every procedural step resulting in unduly protracted proceedings); *Hartford Accident and Indem. Co. v. Smeck*, 78 F.R.D. 537, 541 (E.D. Pa. 1978) (prejudice found when intervenor failed to intervene until default judgment was procured causing further protraction of proceedings); *H & F Barge Co. v. Garber Bros.*, 71 F.R.D. 5, 10 (E.D. La. 1974) (prejudice found in subjecting financially insecure corporation to substantial litigation expense), *aff'd per curiam*, 534 F.2d 1103 (5th Cir. 1976).

271. *Pennsylvania Nat'l Bank & Trust Co. v. American Home Assurance Co.*, 87 F.R.D. 152, 156 (E.D. Pa. 1980). This court, in finding the lack of a meritorious defense prejudicial, seems to have combined the two judicially established requirements.

272. *Hughes v. Holland*, 320 F.2d 781, 782 (D.C. Cir. 1963) (motion denied when further delay would have resulted in foreclosure on disputed real estate).

273. *E.g.*, *Hutton v. Fisher*, 359 F.2d 913, 916 (3d Cir. 1966); *Rooks v. American Brass Co.*, 263 F.2d 166, 169 (6th Cir. 1959) (*per curiam*); *Bridoux v. Eastern Air Lines, Inc.*, 214 F.2d 207, 210 (D.C. Cir.), *cert. denied*, 348 U.S. 821 (1954); *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 245 (3d Cir. 1951); *Kinnear Corp. v. Crawford Door Sales Co.*, 49 F.R.D. 3, 8 (D.S.C. 1970); *Horn v. Intelectron Corp.*, 294 F. Supp. 1153, 1155 (S.D.N.Y. 1968); *Trueblood v. Grayson Shops, Inc.*, 32 F.R.D. 190, 196 n.3 (E.D. Va. 1963); *Wolfsohn v. Raab*, 11 F.R.D. 254, 255 (E.D. Pa. 1951); *Henry v. Metropolitan Life Ins. Co.*, 3 F.R.D. 142, 144 (W.D. Va. 1942) (default).

274. 3 F.R.D. 142 (W.D. Va. 1942) (default).

determined by default judgments if it can reasonably be avoided.”<sup>275</sup> Although *Henry* involved a court’s refusal to enter a default judgment,<sup>276</sup> the Third and Sixth Circuits have applied the *Henry* rationale to determine whether a judgment should be set aside.<sup>277</sup> Notions of what constitutes a substantial amount in controversy have changed since the *Henry* decision in 1942. As recently as 1970, however, \$14,000 was considered a large enough sum to invoke the preference for a trial on the merits.<sup>278</sup> Nevertheless, the existence of a significant amount in controversy is not itself dispositive of the issue whether to set aside a default judgment. Countervailing considerations, such as “a strong showing of willful disobedience of court process”<sup>279</sup> or failure to show a meritorious defense or excuse for the delay,<sup>280</sup> may override the courts’ reluctance to use default judgments to decide cases involving large sums of money.

Cases in which courts have denied set aside motions because of prejudice are rare,<sup>281</sup> however, because mere delay in the final disposition of a case does not generally constitute prejudice sufficiently substantial to warrant a denial.<sup>282</sup> Moreover, courts frequently im-

275. *Id.* at 144.

276. *Id.*

277. *E.g.*, *Hutton v. Fisher*, 359 F.2d 913, 916-17 (3d Cir. 1966) (vacating \$195,000 judgment, but as to liability only); *Rooks v. American Brass Co.*, 263 F.2d 166, 169 (6th Cir. 1959) (per curiam) (vacating \$60,000 default judgment); *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 245 (3d Cir. 1951) (setting aside default judgment conditionally). A few district courts have also applied the *Henry* rationale. *Horn v. Intelectron Corp.*, 294 F. Supp. 1153, 1155 (S.D.N.Y. 1968) (setting aside default judgment); *Trueblood v. Grayson Shops, Inc.*, 32 F.R.D. 190, 196 n.3 (E.D. Va. 1963) (setting aside \$125,000 default judgment conditionally). Other courts, while not adopting the express language of the *Henry* decision, have followed its reasoning. *See Bridoux v. Eastern Air Lines, Inc.*, 214 F.2d 207, 210 (D.C. Cir.) (failure to grant relief from “large money judgment” deemed “improvident” and \$160,000 default judgment set aside conditionally), *cert. denied*, 348 U.S. 821 (1954); *Kinnear Corp. v. Crawford Door Sales Co.*, 49 F.R.D. 3, 8 (D.S.C. 1970) (\$14,000 default judgment set aside when defendant stood “to lose a great deal”); *Wolfsohn v. Raab*, 11 F.R.D. 254, 255 (E.D. Pa. 1951) (default judgment set aside when plaintiff’s claim was “substantial”).

278. *Kinnear Corp. v. Crawford Door Sales Co.*, 49 F.R.D. 3, 8 (D.S.C. 1970).

279. *Pioche Mines Consol., Inc. v. Dolman*, 333 F.2d 257, 270 (9th Cir. 1964) (affirming trial court’s denial of motion to set aside \$1,000,000 default judgment), *cert. denied*, 380 U.S. 956 (1965).

280. *Gomes v. Williams*, 420 F.2d 1364, 1365-66 (10th Cir. 1970) (affirming trial court’s denial of motion to set aside \$153,788.46 default judgment).

281. The ten cases cited in notes 269-75 *supra* were the only cases found in which courts found prejudice sufficiently substantial to warrant the denial of a set aside motion.

282. *E.g.*, *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 246 (3d Cir. 1951) (delay in realizing satisfaction of claim not sufficiently prejudicial to deny set aside motion); *General Tire & Rubber Co. v. Olympic Gardens, Inc.*, 85 F.R.D. 66, 70 (E.D. Pa. 1979) (slight delay in satisfaction of claim not prejudicial); *Caruso v. Drake Motor Lines, Inc.*, 78 F.R.D. 586, 589 (E.D. Pa. 1978) (some delay in finally resolv-

pose conditions to their orders to set aside default judgments to mitigate prejudice to the non-moving party.<sup>283</sup> These conditions may include the imposition on the movant of court costs and/or attorney's fees occasioned by the delay.<sup>284</sup> In addition, courts often require the prompt filing of an answer to avoid further delay.<sup>285</sup> In some cases,

ing claim is always involved in setting aside a default judgment but is not of itself prejudicial); *Thorne v. Pennsylvania*, 77 F.R.D. 396, 398 (E.D. Pa. 1977) (same).

283. *Littlefield v. Walt Flanagan and Co.*, 498 F.2d 1133, 1136 (10th Cir. 1974). Courts justify the imposition of conditions by noting that rule 60(b) authorizes relief "upon such terms as are just." Fed. R. Civ. P. 60(b); *e.g.*, *Thorpe v. Thorpe*, 364 F.2d 692, 694 (D.C. Cir. 1966); *Barber v. Turberville*, 218 F.2d 34, 36 (D.C. Cir. 1954); *Morisse v. Defensive Instruments, Inc.*, 55 F.R.D. 433, 435 (E.D. Wis. 1972). In response to the question, "Considering the aspect of punishment that enters into any refusal to set aside a default judgment when a meritorious defense is present, would you prefer to assess court costs, attorney's fees, or other fines rather than upholding the default judgment," 13 judges indicated that they would prefer to impose these lesser sanctions. Three others agreed that this approach is preferable when a meritorious defense has been presented. Only three judges argued that such sanctions are inappropriate. Thirteen judges indicated that there is no simple answer to this question because each case involves different facts. *See* note 8 *supra*.

284. *E.g.*, *Barber v. Turberville*, 218 F.2d 34, 36 (D.C. Cir. 1954) (all costs of the appeal of the set aside motion); *Security Trust & Sav. Bank v. Walsh*, 91 F.2d 481, 484 (9th Cir. 1937) (prejudice caused by a few days delay in answering capable of mitigation by the imposition of costs); *Insurance Co. of N. Am. v. S.S. Hellenic Patriot*, 87 F.R.D. 136, 139 (S.D.N.Y. 1980) (\$750 to plaintiff's counsel within ten days); *Wilcox v. Triple D Corp.*, 78 F.R.D. 5, 8 (E.D. Va. 1978) (default) (defendant required to reimburse plaintiff for all "costs and expenses reasonably incurred by plaintiff . . . to obtain and retain its default"); *Morisse v. Defensive Instruments, Inc.*, 55 F.R.D. 433, 435 (E.D. Wis. 1972) (\$400 payable to plaintiff or its counsel); *Trueblood v. Grayson Shops, Inc.*, 32 F.R.D. 190, 195 (E.D. Va. 1963) (plaintiff's counsel to be paid the taxable costs of the action, copying costs, phone bills, and \$2,000 to cover attorney's fees and other money owed by the defendant); *Hendricks v. Alcoa S.S. Co.*, 32 F.R.D. 169, 173 (E.D. Pa. 1963) (\$850 to cover attorney's fees and costs); *Williams v. Cal Indus., Int'l*, 2 Bankr. Rep. (West) 76, 85 (Bankr. D. Or. 1979) (\$2500 bond to cover costs and attorney's fees). Court costs and attorney's fees are the most commonly imposed conditions. *Wokan v. Alladin Int'l, Inc.*, 485 F.2d 1232, 1234 (3d Cir. 1973); *Thorpe v. Thorpe*, 364 F.2d 692, 694 (D.C. Cir. 1966); *Williams v. Cal Indus., Int'l*, 2 Bankr. Rep. (West) 76, 85 (Bankr. D. Or. 1979). Rule 55(b)(1) directs the clerk to include court costs when he enters judgment against a defaulting party. Fed. R. Civ. P. 55(b)(1). Furthermore, 28 U.S.C. § 1923(a) (1976) provides for assessment of \$20 for attorney's and proctor's docket fees in cases in which a default judgment is entered by either the clerk or the court.

285. *E.g.*, *Insurance Co. of N. Am. v. S.S. Hellenic Patriot*, 87 F.R.D. 136, 138 (S.D.N.Y. 1980) (20 days to answer); *Williams v. Cal Indus., Int'l*, 2 Bankr. Rep. (West) 76, 85 (Bankr. D. Or. 1979) (same). To avoid further delay or prejudice to the non-moving party, conditions or sanctions other than the prompt filing of an answer have also been imposed. *Gill v. Stollow*, 240 F.2d 669, 672 (2d Cir. 1957) (appear at deposition within a month); *Bridoux v. Eastern Air Lines, Inc.*, 214 F.2d 207, 210 (D.C. Cir.) (counterclaim dismissed), *cert. denied*, 348 U.S. 821 (1954); *Altschul v. Paine Webber, Inc.*, 488 F. Supp. 858, 860 (S.D.N.Y. 1980) (default) (fulfillment of all further obligations on a timely basis); *Wilcox v. Triple D Corp.*, 78 F.R.D. 5, 8

movants have been required to post bond for the amount sought by the other party.<sup>256</sup>

## 2. How Prejudice is Established

Most of the courts that consider possible prejudice to the non-moving party do not place the burden of establishing such prejudice or the lack thereof on either party.<sup>257</sup> Rather, after reviewing the facts, the courts appear to determine *sua sponte* whether there is prejudice sufficiently substantial to influence their decisions.<sup>258</sup> A few courts, however, place the burden of showing lack of prejudice on the movant.<sup>259</sup> The apparent justification is that the movant must persuade the court of the merits of his motion because he requested that the default judgment be set aside. The judicially established requirements thereby serve the goal of judicial economy because the motion to set aside a default judgment will fail unless the movant establishes the presence of a meritorious defense and lack of prejudice to the opposing party. Professor Moore views the judicially established requirements as necessary to counterbalance the inherent liberality of the rules.<sup>260</sup> He suggests that because the rules them-

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(E.D. Va. 1978) (default) (defendant required to pay for future expenses of plaintiff in defending its right to its default); *Hendricks v. Alcoa S.S. Co.*, 32 F.R.D. 169, 173 (E.D. Pa. 1963) (answer interrogatories, produce documents, and pay \$100 if case is not over by a certain date); *Saltzman v. Birrell*, 156 F. Supp. 538, 540 (S.D.N.Y. 1957) (be deposed within 20 days).

286. *Wokan v. Alladin Int'l, Inc.*, 485 F.2d 1232, 1235 (3d Cir. 1973) (for unsatisfied portion of the judgment); *Thorpe v. Thorpe*, 364 F.2d 692, 694 (D.C. Cir. 1966) (for maximum amount demanded by appellee in complaint); *Insurance Co. of N. Am. v. S.S. Hellenic Patriot*, 87 F.R.D. 136, 139 (S.D.N.Y. 1980) (for any judgment the plaintiff might obtain). Although the imposition of reasonable conditions is allowed, *Thorpe v. Thorpe*, 364 F.2d at 694; *Williams v. Cal Indus., Int'l*, 2 Bankr. Rep. (West) 76, 85 (Bankr. D. Or. 1979), in *Wokan* and *Thorpe*, the appellate courts voiced concern about the due process implications of such strict conditions and remanded the cases to the district courts on this issue. 485 F.2d at 1235; 364 F.2d at 695; *accord*, *Littlefield v. Walt Flanagan and Co.*, 498 F.2d 1133, 1136 (10th Cir. 1974) (remanded to the district court to consider the propriety of \$300 sanction). *But cf.* *Barber v. Turberville*, 218 F.2d 34, 36 (D.C. Cir. 1954) (plaintiff could make no claim of prejudice as movant offered to post security for amount of judgment).

287. *E.g.*, *Tolson v. Hodge*, 411 F.2d 123, 130 (4th Cir. 1969); *Bridoux v. Eastern Air Lines, Inc.*, 214 F.2d 207, 209, 210 (D.C. Cir.), *cert. denied*, 348 U.S. 821 (1954); *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 246 (3d Cir. 1951); *Gardner v. Johnson*, 429 F. Supp. 432, 434 (E.D. Mich. 1977) (default); *Bell Tel. Labs., Inc. v. Hughes Aircraft Co.*, 73 F.R.D. 16, 22 (D. Del. 1976); *Schartner v. Copeland*, 59 F.R.D. 653, 656 (M.D. Pa.) (default), *aff'd mem.*, 487 F.2d 1395 (3d Cir. 1973); *SEC v. Vogel*, 49 F.R.D. 297, 299, 300 (S.D.N.Y. 1969); *Horn v. Intellectron Corp.*, 294 F. Supp. 1153, 1155 (S.D.N.Y. 1968) (default).

288. *See* cases cited note 287 *supra*.

289. *E.g.*, *United States v. Berger*, 86 F.R.D. 713, 715 (W.D. Pa. 1980); *Reid v. Liberty Consumer Discount Co.*, 484 F. Supp. 435, 438 (E.D. Pa. 1980).

290. 6 J. Moore, *Federal Practice* ¶ 55.10[4], at 55-252 (2d ed. 1976).

selves are designed to favor trials on the merits at the expense of judicial economy, the judicially established requirements should act as restricting rather than as liberating factors.<sup>291</sup>

In contrast, a few courts have implicitly placed the burden of showing prejudice on the non-moving party.<sup>292</sup> The Third Circuit has further suggested that if the non-movant cannot establish how he would be prejudiced by the setting aside of the default judgment, the court should grant the motion.<sup>293</sup> Under this approach, lack of prejudice acts not as a "necessary counterbalancing factor" but as additional support for granting the set aside motion. Consequently, these courts have apparently concluded that the already liberal rules should be liberally construed whenever possible.<sup>294</sup>

#### PROPOSAL

In deciding whether to set aside a default judgment, courts consider a variety of factors in attempting to resolve the tension between judicial economy and the desire for a trial on the merits. The broad discretion involved in this decision, however, renders it difficult to predict with any degree of certainty how a court will weigh these factors in arriving at its decision. Consequently, the implementation of certain suggestions may provide a more equitable resolution of the tension in the rules and greater consistency and predictability in the disposition of set aside motions.

Because of the drastic nature of the default judgment sanction, the court should ensure that efforts be made to notify the defaulting party of the possible entry of judgment against him. For example, the court might issue an order to show cause why the default judgment should not be granted. Such an order would avoid the problems in determining whether a movant has appeared and is entitled to notice.

Once a default judgment is entered, however, a set aside motion should be disposed of by considering the merits of the defense and the excuse for the delay in tandem. Disposing of a set aside motion on the grounds of the excusability of the delay without sufficient con-

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291. *See id.*

292. *E.g.*, *General Tire & Rubber Co. v. Olympic Gardens, Inc.*, 85 F.R.D. 66, 70 (E.D. Pa. 1979); *Schartner v. Copeland*, 59 F.R.D. 653, 656 (M.D. Pa.) (default), *aff'd mem.*, 487 F.2d 1395 (3d Cir. 1973); *Finch v. Big Chief Drilling Co.*, 56 F.R.D. 456, 458 (E.D. Tex. 1972); *Kulakowich v. A/S Borgestad*, 36 F.R.D. 185, 186 (E.D. Pa. 1964) (default).

293. *E.g.*, *Medunic v. Lederer*, 533 F.2d 891, 893-94 (3d Cir. 1976); *Diversified Utilities Sales, Inc. v. Monte Fusco Excavating Contracting Co.*, 71 F.R.D. 661, 665 (E.D. Pa. 1976); *Stuski v. United States Lines*, 31 F.R.D. 188, 191 (E.D. Pa. 1962) (default); *Teal v. King Farms Co.*, 18 F.R.D. 447, 447-48 (E.D. Pa. 1955) (default); *accord*, *Bavouset v. Shaw's of San Francisco*, 43 F.R.D. 296, 298 (S.D. Tex. 1967) (default).

294. *See* cases cited note 293 *supra*.



sideration of the merits of the movant's defense offends both the goal of judicial economy and the desire for a trial on the merits. Granting a motion without sufficient consideration of the merits of the defense may unnecessarily burden the court if it is later shown that the movant has no defense. Denying a motion without considering the movant's defense may deprive a movant who has a viable defense of his day in court. Yet, overemphasis on the meritorious defense factor may result in unfairness if a wilfully defaulting party is able to bypass the requirements of the rules entirely. By considering the merits of the defense and the excuse for the delay in tandem, a movant without a defense will not burden the court, and a movant with a strong defense will be more likely to succeed as the court may be more inclined to excuse the delay.

When reviewing the movant's alleged defense, the judge should require more than a mere allegation that such a defense exists because an overly liberal standard provides insufficient insight into the likelihood of the eventual success of the defense. A judge should not, however, resolve the merits of the defense at the motion hearing, thus denying the movant the benefit of a formal trial. Instead, the judge should require substantiation of the alleged defense sufficient to indicate a reasonable likelihood of success, resolving all doubts in favor of the movant.

Finally, although courts should be predisposed toward trials on the merits, they should use their power to mitigate any harm to the non-defaulting party or the court. Consistently imposing conditions to granting set aside motions, such as court costs and/or attorney's fees, would further the goal of judicial economy by deterring parties from defaulting and preventing parties from filing set aside motions when they lack a defense to the suit.

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